

## **Sunsuper Pty Ltd**

ABN: 88 010 720 840

AFSL No: 228975

RSE Licence No: L0000291

RSE Registration No: R000337

Sunsuper Pty Ltd  
Sunsuper Superannuation Fund  
Sunsuper Financial Services Pty Ltd  
Sunsuper Pooled Superannuation Trust  
Precision Administration Services Pty Ltd

---

# **Member Outcomes and Claims Committee Charter**

---

**February 2021**

**Index**

1.	Introduction.....	3
2.	Purpose.....	3
3.	Authority.....	3
4.	Responsibilities.....	3
4.1.	Insurance Claims.....	3
4.2.	Product Design.....	4
4.3.	Insurance Product.....	4
4.4.	Member Outcomes (Prudential Standards SPS 515).....	4
4.5.	Policies/Frameworks.....	4
4.6.	Secretarial Responsibilities.....	4
5.	Composition.....	4
5.1.	Size.....	4
5.2.	Knowledge.....	5
5.3.	Independence.....	5
5.4.	Chair.....	6
6.	Meeting Frequency, Criteria and Process.....	6
6.1.	Frequency.....	6
6.2.	Attendees.....	6
6.3.	Secretarial.....	6
6.4.	Resolution and Quorum.....	6
6.5.	Conflicts of Interest.....	7
7.	Compensation.....	7
8.	Appendices.....	7
8.1.	Appendix 1 - Internal Delegations for Insurance Claims.....	7
8.2.	Appendix 2 - Death Benefit Guiding Principles.....	7
	Appendix 1: Internal Delegations for Insurance Claims.....	8
	Appendix 2: Death Benefit Guiding Principles.....	12

## 1. Introduction

This charter outlines the purpose, authority, responsibilities, composition and meetings of the Member Outcomes and Claims Committee ("Committee") established by Sunsuper Pty Ltd ("Sunsuper" or the "Trustee") and its Board of Directors ("Board").

## 2. Purpose

On behalf of the Board, the purpose of the Committee supports two key aims:

- a) to assist the Board, ensure Sunsuper's products, services and corporate strategy deliver member outcomes consistent with Trustee's duty to act in the best interests of all members and the requirements of Prudential Standard SPS 515- Strategic Planning and Member Outcomes; and
- b) to provide oversight of the Sunsuper Superannuation Fund's ("the Fund") Death, Disability and Terminal Illness claims and provide recommendations for any improvement to the effectiveness of claims management.

As part of the oversight function, the Committee will review:

- Claims for decision as per delegations;
- Key statistics relating to claims activity and trends;
- The Internal Delegation Instructions, the Death Benefit Guiding Principles and Claims Handling Principles on an annual basis; and
- All other matters consistent with responsibilities under this Charter.

The Board will evaluate the Committee's performance annually.

## 3. Authority

The Committee operates under delegated authority from the Board, as defined in the Internal Delegation Instructions set out in Appendix 1.

In conducting its activities and making recommendations, the Committee will have regard to the following:

- The best interests of members and Sunsuper's purpose, vision and values;
- Ensuring claims decisions align with the Insurance Management Framework as required by related regulatory obligations;
- Ensuring product and service design delivers member outcomes as per Trustee requirements;
- Giving proper regard to industry and regulatory reviews as related to claims practices and member outcomes' assessments within superannuation;
- Oversight of the claims experience and performance in relation to internal standards and service provider agreements;
- Sunsuper's Risk Management Framework;
- Good Corporate Governance; and
- Legislative and Regulatory guidelines that support Sunsuper's product, insurance claims and member outcomes' assessment as set out in Prudential Standard SPS 515.

## 4. Responsibilities

The Committee has the responsibilities set out in sections 4.1 to 4.5.

The Secretarial responsibilities are set out in section 4.5.

### 4.1. Insurance Claims

- a) Provide oversight of the claims management function including the monitoring of our compliance with the SIS s52(7) (d) covenant.
- b) Make decisions on behalf of the Board in relation to the distribution of Death claims;
- c) On behalf of the Board, in accordance with Trustee obligations, review decisions made by insurers in regards to insured claims;
- d) Make decisions on behalf of the Board in relation to self-insured claims, including distribution of Death benefits and assessment of Disability and Terminal illness claims;
- e) Identify and consider risks, litigation, complaints, industry trends and any legislative change relating to claims;

- f) Review effectiveness of Sunsuper's claims' framework and make recommendations for any improvements;
- g) Monitoring of claims decisions made under delegation, the review and making of decisions in relation to select claims as required; and
- h) For self-insurance claims, consideration of any claims' recommendations made by the relevant employer representative on behalf of the employer.

#### 4.2. Product Design

- a) Advise the Board on the extent to which the design (including features, terms and conditions, fees and charges) of Sunsuper's products (including insurance products but excluding corporate and institutional plans) are delivering outcomes aligned to members best interests individually and collectively; and
- b) Recommend product changes to the Board. (This excludes corporate and institutional plans and any other changes where management has delegated authority).

#### 4.3. Insurance Product

- a) Oversight the selection of an insurer for Sunsuper for Life and Sunsuper for Life (Business) and make a recommendation to the Board as needed;
- b) Annually review the effectiveness of the fund's insurance management framework and make recommendations for improvement; and
- c) Recommend any distribution from the insurance reserve (Premium Adjustment Mechanism) over and above that delegated to management.

#### 4.4. Member Outcomes (Prudential Standards SPS 515)

Oversight the annual review of the member outcomes' assessment pursuant to Prudential Standard SPS 515- Strategic Planning and Member Outcomes.

Responsibilities under section 4 above excludes corporate and institutional plans where authority has been delegated to management and input into review of Corporate and Institutional Framework is provided by Successor Fund Transfer Committee. It is noted that management endeavours to keep products and services consistent.

#### 4.5. Policies/Frameworks

- a) Note changes to Customer Relations Policy as approved by EGM Customer Engagement.
- b) Note material changes to Vulnerable Consumer Policy approved by EGM Customer Engagement.
- c) Review and approve the Strategic and Business Planning Framework and recommend changes to the Sunsuper Board every three years.
- d) Approve the Annual Code Compliance Report relating to the Insurance in Super Voluntary Code of Practice.
- e) Approve Business Performance Review Design and Report.
- f) Recommend Legislative Outcomes Assessment Product Summary and Determinations to the Board.

#### 4.6. Secretarial Responsibilities

- a) Annually review and assess the adequacy of the Committee Charter, requesting Board approval for any proposed changes, and ensure appropriate disclosure as may be required by law or regulation;
- b) Annually confirm that all responsibilities in the Charter have been carried out;
- c) Ensure that the Committee's performance is evaluated on a regular basis, and report the results to the Board;
- d) Be available to meet with APRA on request; and
- e) Perform other activities related to this Charter as requested by the Board.

## 5. **Composition**

### 5.1. Size

The Committee shall consist of at least three directors.

An external independent member may be appointed as "Claims Committee Independent Expert" on the recommendation of the members of the Committee and the approval of the Board. The scope and nature of the role will be agreed by the members of the Committee and approved by the Board.

The Committee may obtain independent external advice, with the prior approval of the Board, to assist them in the proper exercise of their powers and discharge of duties.

The Committee will be advised by the Advisory Committee of Management (ACM) for Insurance Claims matters only as per the delegations included in Appendix 1.

For self-insured claims, and where requested by the Employer for a particular claim, an Employer Representative will advise the Committee.

When included the employer representative will be a person as nominated by the employer, who is able to make a recommendation in relation to the respective self-insured claims. The employer representative will attend the meeting only for the portion where self-insured claims are being discussed.

*5.1.1. Advisory Committee of Management*

The Advisory Committee of Management (ACM) is comprised of the Sunsuper General Counsel or delegate, the Head of Insurance Services or delegate, and the Head of Product or delegate. The role of the ACM is to make decisions on matters pursuant to the delegations in Appendix 1 and to escalate matters to the Committee where appropriate.

Quorum for Advisory Committee of Management

The quorum for the decisions of the Advisory Committee of Management will be determined as follows:

$$\left( \frac{\text{Current members of the Committee}}{2} \right) + 1, \text{ rounded down to the nearest whole number.}$$

A resolution of ACM members is passed if at least two-thirds of the members, or their delegates, reach agreement relating to a claim recommendation. Where consensus cannot be reached by at least two-thirds of the members or their delegates, the claim will be referred to the Committee for determination.

*5.1.2. Delegations to Any Two (2) Members of Member Outcomes and Claims Committee*

The Committee also delegates to any two (2) members of the Committee the authority to make decisions about matters within the scope of authority of the Committee and independent of Committee meetings. This delegation is made to facilitate responsiveness and decision-making that needs to be undertaken between Committee meetings. Where such delegation is exercised, the Committee Members making the decision are responsible for reporting to the Committee via minutes of the meeting. Please see Appendix 1.

*5.2. Knowledge*

The Committee shall collectively have the skills and knowledge required for the proper functioning of the Committee.

*5.3. Independence*

All members of the Committee shall be independent.

An independent member is a member who is independent of management and free of any business relationship or other relationship that could materially interfere with, or could

reasonable be perceived to materially interfere with, the exercise of their unfettered and independent judgment.

A relationship is “material” if, in the judgment of the Board, it would interfere with the member’s independent judgment.

Members shall also be considered independent if they have no relationship with Sunsuper, its affiliates or external service providers that might materially interfere with the exercise of their unfettered and independent judgment.

Nomination of a Director by one of Sunsuper’s sponsoring shareholders, will not impact on the independence of the Director as a Committee member for the purposes of this section.

The Board shall, on an annual basis, review the position and associations of each of the members to determine if they are independent of management and free of any business relationship or other relationship that could materially interfere with - or could reasonably be perceived to materially interfere with - the exercise of their unfettered and independent judgment. The Committee shall affirmatively make a determination as to the independence of each member and disclose such determinations to the Board.

5.4. Chair

The Chair of the Committee shall be appointed by the Board, after consultation with all Directors, and on recommendation of all of the employer nominated directors and member nominated directors of the Board and shall not be the Chair of Sunsuper Pty Ltd.

**6. Meeting Frequency, Criteria and Process**

6.1. Frequency

The Committee shall meet on a regular basis, with authority to convene additional meetings as circumstances require. Committee members are expected to attend each meeting, in person or via teleconference or video conference.

6.2. Attendees

Committee Members, the Company Secretary or delegate, Head of Insurance Services or delegate, Head of Product or delegate, Executive General Manager Customer Engagement or delegate and Chief Financial Officer or delegate, Chief Member Officer or delegate and any other persons considered appropriate shall attend meetings of the Committee, as necessary.

6.3. Secretarial

The delegated member of the Company Secretariat team will be responsible for secretarial support to the Committee. An Agenda with supporting papers will be circulated at least five days prior to each meeting to members of the Committee and other meeting attendees.

Minutes will be prepared for each meeting, circulated to the Chair within one week of each meeting for review, and then confirmed as accurate prior to the following meeting.

6.4. Resolution and Quorum

The requirements for a resolution and/or a quorum for:

- Resolutions made outside of a Committee meeting, for insurance claims’ decisions only; and
- Quorum for the transaction of business at any meeting of the Committee; will be determined as set out below.

6.4.1. *Review of Insurance Claims’ Decisions Only*

Insurance Claims’ decisions can be made by resolution, outside of a Committee meeting by members of the Committee.

A resolution of Committee members is passed if at least two of the Committee Members vote in favour of the resolution.

6.4.2. *All Other Matters Except Review of Insurance Claims' Decisions*

The quorum for the Committee will be determined as follows:

$$\left( \frac{\text{Current members of the Committee}}{2} \right) + 1, \text{ rounded down to the nearest whole number.}$$

Provided always that where the application of the formula would result in a number less than two, the presence of two members will be necessary to constitute a quorum.

A resolution of Committee members is passed if at least two-thirds of the members present at the meeting (rounded up to the nearest whole number) vote in favour of the resolution.

Members may not vote or participate by proxy. The Committee may act by unanimous written consent of all members.

6.5. Conflicts of Interest

If a Committee member, consultant, ACM member or management team member has an interest in, or an association with, a particular decision beyond the scope of their Sunsuper responsibilities, then this interest must be declared ahead of the discussion and/or decision. The Committee will then decide whether or not that person should remain included in the decision or whether they should remove themselves from the meeting for the purposes of the recommendation and or decision.

**7. Compensation**

Members shall receive fees for services provided to the Committee, either independently or as part of their payment for acting as a Board member.

**8. Appendices**

8.1. Appendix 1 - Internal Delegations for Insurance Claims

Sets out the delegations applicable to claims processing.

8.2. Appendix 2 - Death Benefit Guiding Principles

Sets out the guiding principles applicable to the distribution of death benefits.

## **Appendix 1: Internal Delegations for Insurance Claims**

### **Executive Summary**

The Board of Sunsuper delegates to the Member Outcomes and Claims Committee ("MOCC"), constituted as a Committee of the Board, the authority to make decisions regarding benefit claims for death, disablement and early release for Sunsuper members in accordance with the below.

This delegation operates in conjunction with delegations to members of the MOCC, the Advisory Committee of Management ("ACM"), the Executive General Manager Customer Engagement, Sunsuper General Counsel, Head of Insurance Services, Head of Product and the Precision Administration Services ("Sunsuper Claims Administrator").

The Board delegates to the ACM authority to make first decisions on the following claims:

- Death claims (excluding self-insured claims);
- Total and permanent disability claims (excluding self-insured claims); and
- Early release claims as a result of Permanent Incapacity.

These decisions will be based on recommendations from the Sunsuper Claims Administrator. Where the ACM cannot reach agreement, or a claimant raises an objection to a decision, the ACM may refer the matter to the MOCC.

The ACM is comprised of the following members (or their delegates):

- Sunsuper General Counsel;
- Head of Insurance Services; and
- Head of Product.

The MOCC also delegates to any two (2) members of the MOCC (by way of the overall delegation of the Board outlined in section 5.1.2 of MOCC Charter), who are also members of the Sunsuper Board, the authority to make decisions about matters within the scope of authority of the MOCC and independent of MOCC meetings. This delegation is made to facilitate responsiveness and decision-making that needs to be undertaken between MOCC meetings. Where such delegation is exercised, the MOCC members making the decision are responsible for reporting to the MOCC via minutes of the meeting.



In summary claims decisions are authorised as follows:

	<b>Initial Death; Disability; Early Release (PI) Decisions</b>	<b>Early Release (PI); TMC; Binding Death Benoms</b>	<b>Self-Insured Claims</b>	<b>Urgent Death Claim Payments</b>	<b>Death/ Disability/ Early Release (PI) Resubmissions</b>	<b>Approved Insurance Claims</b>	<b>AFCA Conciliation Outcomes</b>
<b>ACM</b>	X				X (only for an objection for GOP & LOA)*		
<b>Head of Insurance Services (outside of ACM delegations)</b>		X					
<b>MOCC or any two (2) MOCC (and Board) Members</b>	No agreement by ACM		X		X		
<b>Executive General Manager, Customer Engagement</b>				X			
<b>General Counsel</b>							X
<b>Sunsuper Claims Administrator</b>						X	

\*GOP (Grant of Probate) LOA (Letters of Administration).

The ACM may decide that a particular death, disablement or early release (PI) benefits claim should not be considered by the ACM but should be referred to the MOCC.

The MOCC may decide that a particular death, disablement or early release (PI) benefits claim should not be considered by the MOCC but should be referred to the Board.

Death, Disablement and Early Release (PI) Benefits Delegations from Board to MOCC

Delegations for Self-Insured Claims from Board to MOCC

The Board delegates to the MOCC claims decisions relating to self-insured claims in accordance with the relevant Trust Deed. When requested by the Employer, a representative from the respective employer will form part of the MOCC for the purposes of considering self-insured claims.

Delegations for Death Benefits from Board to MOCC

Subject to the delegations of authority otherwise contained in this document, the Board delegates to the MOCC the following authorities in relation to assessment and payment of death benefits (account balance and insured amount):

- a. Authority to determine identity of persons as legal personal representatives, persons as a spouse, persons in interdependent relationships (including life-time partners), persons as a child, and other dependants in accordance with law and Guiding Death Benefit Principles, and incidental questions of fact required by the Guiding Death Benefit Principles, for example, the existence of a Will, the Executor or Administrator of the Estate, and the beneficiaries under that Will;
- b. Authority to determine the recipients of the death benefit in accordance with law and the relevant Trust Deed and the Guiding Death Benefit Principles;
- c. Authority to instruct the SunsUPER Claims Administrator to pay the death benefit to the

- recipient/s determined by the MOCC; and
- d. Authority to form an opinion whether or not an insurance benefit (Death or Terminal Medical Condition) should be payable as defined in the applicable policy of insurance.

The terms used in Guiding Death Benefit Principles adopted by Board have the same meaning in this delegation.

*Delegations for Disability Claims from Board to MOCC*

Subject to the delegations of authority otherwise contained in these delegations, the Board delegates to the MOCC the following authorities in relation to assessment and payment of total and permanent disablement claims (including TPD Assist), total disability and permanent incapacity claims:

- a. Authority to form an opinion:
  - i. Whether or not it is reasonable to accept an insurer's decision as to whether any member suffers Total and Permanent Disablement, or Total Disablement, as defined in the Trust Deed and the applicable policy of insurance; and
  - ii. Whether or not a condition of release has been satisfied in relation to a member in terms of the Superannuation Industry (Supervision) Act 1993.
- b. Authority to form an opinion:
  - i. Whether or not any member suffers Permanent Incapacity, as defined in the Trust Deed; and
  - ii. Whether or not a condition of release has been satisfied in relation to a member in terms of the Superannuation Industry (Supervision) Act 1993.
- c. Authority to instruct the Sunsuper Claims Administrator to correspond with the Insurer requesting reconsideration of a claim if:
  - i. The insurer has refused the claim; and
  - ii. The MOCC forms an opinion that the available evidence is not sufficient to support the refusal of the claim or the member has reasonable grounds on which to challenge the insurer's decision.

This includes authority to give instructions to the Sunsuper Claims Administrator about the content of the correspondence (e.g. specific matters of concern to the Committee in relation to the insurer's assessment of the claim).

*Delegations for Early Release Benefits (Terminal Medical Condition) from Board to MOCC*

Subject to the delegations of authority otherwise contained in these delegations, the Board delegates to the MOCC the following authorities in relation to assessment and payment of claims for benefits paid on compassionate grounds, due to a Terminal Medical Condition (Early Release), or where permitted by the rules of the Fund, another condition of release is satisfied in accordance with Superannuation Industry (Supervision) Regulations 1994:

- a. Authority to form an opinion that a member is eligible for early release of a benefit as defined in legislation; and
- b. Authority to instruct the Sunsuper Claims Administrator to pay an Early Release claim.

*Referrals to the Board*

The MOCC may decide that a particular death, total and permanent disablement, terminal medical condition, or total disability benefit claim should not be determined by the MOCC but should be referred to the Board for determination.

The MOCC must refer to the Board any claim for a disablement benefit where the MOCC has formed the opinion that:

- The insurer has incorrectly decided to refuse the benefit; and
- No further evidence is required to properly assess the claim.

### *MOCC's Deliberations*

In making a determination, the MOCC must consider:

- The recommendations of the Sunsuper Claims Administrator; and
- The decision of the Fund's Insurer or for self-insured claims any recommendation of the Employer representative.

The MOCC is authorised to seek and take into account any other information, evidence, opinions, or recommendations the MOCC considers relevant.

### *Delegations of Authority from Board to Executive General Manager, Customer Engagement*

To approve distribution recommendation and payment of claims for death benefits in exigent circumstances in accordance with law and the Trust Deed and the Guiding Death Benefit Principles.

The Executive General Manager, Customer Engagement must consider the recommendation of the Sunsuper Claims Administrator and Head of Insurance Services in assessing all benefit claims.

### *Delegations of Authority from Board to the Sunsuper Claims Administrator*

Where the Fund's Insurer has determined to accept an insured claim, to pay:

- Total and permanent disablement claims (consisting of the member's account balance and the insured amount);
- Total and permanent disablement assist claims (consisting of the annual payment amount with or without the member's account balance);
- Terminal medical condition claims (consisting of the member's account balance and the insured amount); and
- Temporary disability (salary continuance) claims (consisting of the insured amount only);

To approve payment of claims for Permanent Incapacity.

To pay all claims for early release of benefits due to permanent incapacity, terminal illness (where there is no insurance), compassionate grounds, and financial hardship in accordance with the relevant Trust Deed and agreed procedures consistent with the law.

### *Referrals to the MOCC*

In the instance that consensus agreement is not reached by the ACM on any claim, or in any other event, the Sunsuper General Counsel may decide that a particular claim should not be determined by any of the ACM members, but should be referred to the MOCC for determination.

### *Delegations of Authority for Head of Insurance Services (Outside of ACM Delegations)*

The Head of Insurance Services (or delegate) may approve payments of claims:

- For Permanent Incapacity;
- For Terminal Medical Condition;
- In accordance with Binding Death Benefit Nominations; after considering the recommendation of the Claims Administration teams.

### *Effect of Delegations*

A decision made in accordance with these delegations is a decision of Sunsuper Pty Ltd as Trustee of the Sunsuper Superannuation Fund and takes effect as a decision of the Board.

**Appendix 2: Death Benefit Guiding Principles**

**Index**

Annexure 1: The Law Relating to Superannuation Death Benefits..... 14

    Background..... 14

    Trust Deed..... 14

    Binding Nominations..... 14

    Trustee’s Discretion where there is no Binding Nomination ..... 15

    Who Qualifies as a Dependant? ..... 15

        Spouse - meaning of..... 15

        De facto spouse - meaning of..... 15

        Child - meaning of..... 16

        Person in an Interdependency Relationship with the Member..... 16

        Dependent on the Member for Maintenance or Support..... 17

    Who Qualifies as a Legal Personal Representative (LPR)? ..... 17

        What is a LPR?..... 17

        What is the role of a LPR?..... 17

        How are the assets of the Estate distributed by a LPR?..... 17

        Executors and Administrators..... 17

        Where no dependant or LPR can be identified..... 18

        The Difference between a payment directly to a dependant and payment to the Legal Personal Representative..... 18

    Overview ..... 18

    Creditors of the estate..... 18

    Family Provision Claims..... 18

        What is a family provision claim? ..... 18

        Relevance of the Trustee’s decision to pay the benefit to the Estate..... 18

        Who may apply for further provision?..... 18

        When must a family provision claim be brought?..... 19

        Interaction between the Family Provision Claim and AFCA ..... 19

    Grants of Probate or Letters of Administration ..... 19

        Effect of a Grant of Probate or Letters of Administration..... 19

        When is Probate or LOA necessary? ..... 19

        Protection provided by Probate or LOA..... 19

        Grant of Letters of Administration..... 20

        Grant of Probate..... 20

        Mechanics of obtaining Probate or Letters of Administration ..... 20

Annexure 2: Guiding Death Benefit Principles ..... 21

    Overview ..... 21

    Tax on death benefits..... 21

        Beneficiary is ‘tax dependant’..... 21

        Beneficiary is not a ‘tax dependant’ ..... 21

        Legal Personal Representative..... 22

    Sunsuper requirement for Probate or LOA..... 22

        Overview ..... 22

        Cost of obtaining Probate or LOA..... 22

        Objection to obtaining LOA..... 22

        Objection to obtaining Probate ..... 22

    Distribution Guide ..... 23

        Clause 1(a) (i)..... 23

        Clause 1(a) (ii)..... 24

        Clause 1(a) (iii):..... 24

        Clause 1(b)..... 24

        Clause 1(c): ..... 24

        Clause 1(d): ..... 24

        Clause 1(e): ..... 25

        Clause 1(f):..... 25

        Clause 2(a): ..... 25

Clause 2(b).....	25
Distribution Decision Tree .....	26
Intestacy Provisions under the Succession Act 1981(Qld) .....	27
Summary of the Rules of Intestacy .....	27
Meaning of intestacy.....	27
How the estate is distributed on intestacy.....	27
Who is a de facto spouse for intestacy? .....	27
Pictorial flowchart for distribution on intestacy .....	27
Linear flowchart for distribution on intestacy .....	28
Meanings of terms on intestacy distribution.....	29
Annexure 3 - Challenge to Trustee's Decision .....	30
Which Jurisdiction.....	30
Australian Financial Complaints Authority (AFCA).....	30
Right to Challenge Trustee's Decision.....	30
Right to Challenge Restricted in the Case of a Death Benefit.....	30
AFCA's Procedures on Receipt of a Complaint.....	31
AFCA's Decision-Making Powers .....	31

## **Annexure 1: The Law Relating to Superannuation Death Benefits**

### Background

1. The payment of superannuation death benefits is governed by the *Superannuation Industry (Supervision) Act 1993 (SIS)* and the regulations to the SIS, considered in conjunction with the Trust Deed regulating Sunsuper.
2. The Trust Deed provides for the payment of a benefit from the Fund on the death of a member. This is a recognised core purpose of a regulated superannuation fund and is in keeping with the sole purpose test in the SIS.
3. The death benefit will typically be comprised of the aggregate of:
  - The member's account balance; and
  - the benefit payable under life (death) insurance taken out by Sunsuper for the benefit of the member.
4. This document provides an overview of the law in relation to the payment of death benefits, including the nature of the discretion that the Trustee has in relation to Preferred Beneficiary Nominations and the validity of Binding Nominations.

### Trust Deed

5. The Trust Deed provides that on the death of a member:
  - Where there is a valid Binding Nomination, the Trustee must pay the benefit to the person or persons nominated, and if more than one person is nominated in the proportions specified;<sup>1</sup>
  - Otherwise, the Trustee must pay the benefit to such of the Member's Dependants or Legal Personal Representative, in such proportions, as the Trustee determines;
  - If the Trustee after making reasonable enquiries is unable to identify any Dependants or Legal Personal Representative of a deceased member, the Trustee may pay the benefit to any individual who in the Trustee's opinion has a fair claim to the benefit, where the benefit can be paid to that person in accordance with superannuation legislation.
6. On joining, Sunsuper members are given the option of lodging a Preferred Beneficiary Nomination or a Binding Death Benefit Nomination to guide or bind the Trustee in distributing their super on death. On at least an annual basis (with the annual Member Statements), for members who have lodged a preferred nomination, Sunsuper confirms that nomination and those members who have made a Binding Nomination are informed when their Binding Nomination is due to expire

### Binding Nominations

7. If a member has provided a valid Binding Nomination, and the Nomination remains valid at the date of death, the Trustee has no discretion in relation to whom the death benefit is to be paid.<sup>2</sup>
8. In order for a Binding Nomination to be valid the Nomination must:
  - Comply with the form and content requirements specified by superannuation legislation<sup>3</sup>, which are:
    - The Nomination be in writing, signed, and dated, by the member in the presence of two (2) witnesses, being persons each of whom has turned 18 and neither of whom is a person mentioned in the nomination<sup>4</sup>; and
    - The Nomination must contain a declaration, signed, and dated, by the witnesses stating that the notice was signed by the member in their presence.<sup>5</sup>
  - Nominate:
    - A person or persons who qualify as Dependants of the member at the time of the member's death; or
    - The member's Legal Personal Representative<sup>6</sup>.
9. A Binding Nomination will automatically cease to have effect at the end of the period of 3 years after the date the Nomination was first signed, or last confirmed or amended, by the member. A

---

<sup>1</sup> Clause 11.8(d)(ii) of the Trust Deed.

<sup>2</sup> Clause 11.8(d)(ii) of the Trust Deed.

<sup>3</sup> Section 6.17A(4) of the Superannuation Industry (Supervisions) Regulations 1994 (Cth).

<sup>4</sup> Section 6.17A(6) of the Superannuation Industry (Supervision) Regulations 1994 (Cth).

<sup>5</sup> Section 6.17A(6) of the Superannuation Industry (Supervision) Regulation (Cth).

<sup>6</sup> Section 6.17(7) of the Superannuation Industry (Supervision) Regulations 1994 (Cth).

confirmation of a Binding Nomination must be in writing, dated and signed by the member (there are no witness requirements for a confirmation).<sup>7</sup>

10. A Binding Nomination can be revoked at any time by notice in writing, dated and signed by the Member.<sup>8</sup>

#### Trustee's Discretion Where There is No Binding Nomination

11. The Trustee has a discretion in relation to the payment of the death benefit, unless a valid Binding Nomination (or reversionary benefit nomination) has been made and must consider who falls within the eligible class of beneficiaries and whom within that class to benefit.
12. The law requires that the Trustee exercise this discretion in good faith, upon a real and genuine consideration and in accordance with the purposes for which the discretion was conferred.<sup>9</sup>
13. The Trustee may take into account the member's wishes expressed in a Preferred Beneficiary Nomination but is not obliged to do so and the existence of the Preferred Beneficiary Nomination does not override the Trustee's discretion.

#### Who Qualifies as a Dependant?

14. For the purpose of payment of a superannuation benefit, a Dependant of a member means a person who is, or was, at the relevant time:
- a 'Spouse' of the member<sup>10</sup>;
  - a 'Child' of the member<sup>11</sup>;
  - financially dependent upon the member for maintenance or support<sup>12</sup>; or
  - in an Interdependency Relationship with the member.<sup>13</sup>

#### Spouse - Meaning of

15. A Spouse of a member includes:
- another person with whom the member is in a relationship that is registered under a prescribed law of a State or Territory<sup>14</sup>; and
  - another person who, although not legally married to the member, lives with the member on a "genuine domestic basis" in a relationship as a couple, such as a de facto spouse.<sup>15</sup>

#### De Facto Spouse - Meaning of

16. Whether or not a person is a de facto spouse is a question of fact, not a question of law.
17. While we acknowledge that the Succession Act 1981 (Qld) has a requirement for a couple to have lived together on a domestic basis continuously for two years to be considered in a de facto relationship, this does not apply under superannuation law. There is no minimum time frame for a couple to be considered to be in a de facto relationship.
18. A person is in a de facto spouse relationship with another person if the two:
- are not legally married to each other;
  - are not related by family; and
  - live together on a genuine domestic basis, as a couple.
19. The circumstances that may also be considered in determining the existence of a de facto relationship include:
- The nature and extent of their common residence;
  - The length of their relationship;
  - Whether a sexual relationship existed;
  - The degree of financial dependence or interdependence, and any arrangements

---

<sup>7</sup> Section 6.17A(5) of the Superannuation Industry (Supervision) Regulation (Cth).

<sup>8</sup> Section 6.17(5) of the Superannuation Industry (Supervision) Regulations 1994 (Cth).

<sup>9</sup> Karger v Paul [1984] V.R 161.

<sup>10</sup> Section 10 of the Superannuation Industry (Supervision) Act 1993 (Cth).

<sup>11</sup> Section 10 of the Superannuation Industry (Supervision) Act 1993 (Cth).

<sup>12</sup> Kauri Timber Co (Tas) Pty Ltd v Reeman; Malek v Federal Commissioner of Taxation (1999); 302-195 (i)(d) of the Income Tax Assessment Act 1997 (Cth).

<sup>13</sup> Section 10A of the Superannuation Industry (Supervision) Act 1993 (Cth).

<sup>14</sup> Civil Partnerships Act 2011 (Qld). Similar legislation is in force in Victoria, Tasmania and the ACT by which same-sex couples can register their relationships.

<sup>15</sup> Definition of Spouse in clause 1.2 of the Trust Deed and section 10(1) of the Superannuation Industry (Supervision) Act 1993.

- for financial support, between or by the parties;
- The ownership, use and acquisition of property;
- The degree of mutual commitment to a shared life, including the care and support of each other;
- The care and support of children;
- The performance of household tasks; and
- The reputation and public aspects of the relationship.<sup>16</sup>

#### Child - Meaning of

20. A Child<sup>17</sup> of a member includes:
- An adopted child<sup>18</sup>, a stepchild<sup>19</sup> or an ex-nuptial child of the member; and
  - A child of the member's spouse; and
  - A child of the member under the extended definition in the Family Law Act 1975,<sup>20</sup> which includes:
    - A child born as a result of an artificial procedure in the circumstances described;<sup>21</sup> and
    - A child born under a surrogacy arrangement where a court has made an order that the child is a child of that person.<sup>22</sup>
21. The definition is inclusive and extends to a person of aboriginal or Torres Strait Islander descent who is not a biological child of the member, but it can be demonstrated from both an objective and subject perspective that:
- the person was:
    - by customary law regarded as a 'child' of the member;
    - regarded by the member, as their son or daughter;
    - accepted by the community as the son or daughter of the member;
    - regarded himself or herself as the son or daughter of the member; and
  - the evidence establishes the above over a period of time sufficient for the conclusion to be reached.<sup>23</sup>
22. A person remains a child of a deceased Member regardless of their age (even when over the age of 18). The only impact in respect of payments to children over the age of 18 is how the benefit is taxed.

#### Person in an Interdependency Relationship with the Member

23. A person will also qualify as a 'dependant' if at the date of death of the member they had an "interdependency relationship" with the member.
24. Two persons (whether or not related by family) have an interdependency relationship if all of the following are satisfied:
- They have a close personal relationship;
  - They live together;
  - One or each of them provides the other with financial support; and
  - One or each of them provides the other with domestic support and personal care.<sup>24</sup>
25. Two people can be classified as having an interdependency relationship if they have a close personal relationship (i.e., satisfy criteria 1) but do not live together or provide each other with financial or domestic support or personal care (i.e., do not satisfy criteria 2-4), if the reason for not satisfying criteria 2-4 is that;
- either or both of them suffer from a physical, intellectual or psychiatric disability, or

---

<sup>16</sup> Section 32DA (2) of the Acts Interpretation Act 1954.

<sup>17</sup> Section 10 of the Superannuation Industry (Supervision) Act 1993 (Qld).

<sup>18</sup> An *adopted* child is a person the deceased member adopted in accordance with the relevant State adoption legislation; for Queensland the *Adoption Act 2009 (Qld)*.

<sup>19</sup> A *stepchild* is a person whose natural parent is alive and married to the deceased member at the time of the member's death.

<sup>20</sup> The *Family Law Act 1975* includes as a child of a relationship children born during the relationship through an artificial procedure.

<sup>21</sup> Section 60 H of the *Family Law Act 1975*.

<sup>22</sup> Section 60HB of the *Family Law Act 1975*.

<sup>23</sup> D06-07\008 [2006] SCTA 110 at pages 7 to 10.

<sup>24</sup> 10A(1) of the Superannuation Industry (Supervision) Act 1993.



- They are temporarily living apart (temporarily working overseas or incarcerated).<sup>25</sup>
26. In considering these criteria, the Trustee will have regard to all of the circumstances of the relationship including (where relevant):
- The duration of the relationship;
  - Whether or not a sexual relationship exists;
  - The ownership, use and acquisition of property;
  - The degree of mutual commitment to a shared life;
  - The care and support of children;
  - The reputation and public aspects of the relationship;
  - The degree of emotional support;
  - The extent to which the relationship is one of mere convenience;
    - Any evidence suggesting the parties intend the relationship to be permanent; and
    - The existence of a statutory declaration signed by one of the persons to the effect that the person is or was in an interdependency relationship.<sup>26</sup>

#### Dependent on the Member for Maintenance or Support

27. A person who is financially reliant on the deceased at the date of death may qualify as a dependant under superannuation law, if they are dependent on the deceased member for maintenance or support. This is a question of fact.
28. Financial dependency can be established where a person relies wholly or in part on another for his or her means of subsistence. The person need not show total dependency nor need for the money received in order to qualify as financially dependent.<sup>27</sup>

#### Who Qualifies as a Legal Personal Representative (LPR)?

##### *What is a LPR?*

29. The LPR for the purpose of death benefit distribution will be the executor of the deceased's Will or the administrator of the deceased's estate.<sup>28</sup>

##### *What is the role of a LPR?*

30. The LPR is tasked with administering the deceased's estate, including:
- Payment of the deceased's estate debts and funeral expenses,
  - Sale or mortgage of real estate, or
  - Distributing the proceeds of the sale of real estate, or other assets, to the beneficiaries elected under the will.

##### *How are the Assets of the Estate Distributed by a LPR?*

31. If the deceased has left a valid Will the estate will be distributed in accordance with the terms of the Will. If the deceased died leaving no Will or no valid Will the deceased is said to have died "intestate" and the intestacy provisions in the *Succession Act 1981 (Qld)* apply.
32. On occasion, a member may be too young to make a valid Will. The general rule is that people under the age of 18 do not have the capacity to make a binding Will. Wills made by minors are therefore generally considered to be non-binding. The exception is that people who are under the age of 18 and also married can make a binding Will. This means that some Sunsuper members' estate will have to be distributed in accordance with the intestacy provisions in the *Succession Act 1981 (Qld)*.

#### *Executors and Administrators*

33. In the case of a member's death, the member's Legal Personal Representative includes the member's Executor or Administrator.<sup>29</sup> An Executor is the person or persons appointed under a valid Will to administer the estate of a person on their death in accordance with the terms of the Will.

---

<sup>25</sup> Section 1.04AAAA(3) of the Superannuation Industry (Supervision) Regulations 1994 (Cth).

<sup>26</sup> Regulation 1.04AAAA SIS regulations 1994.

<sup>27</sup> APRA Superannuation Circular No.I.C.2 Paragraphs 13 and 14.

<sup>28</sup> 10 of Superannuation Industry (Supervision) Act 1993 (Cth). The remainder of the definition does not apply to death benefits.

<sup>29</sup> Definition of Legal Personal Representative in clause 1.2 of the Trust Deed and section 10(1) of the Superannuation Industry (Supervision) Act 1993.

34. Where a person dies leaving no Will or a Will that does not validly appoint an executor or a Will appointing an executor, but that executor dies or is unwilling or unable to act, the person's estate is administered by persons appointed by the court and called an *Administrator*.

*Where no Dependant or LPR can be Identified*

35. If the Trustee, after making reasonable enquiries, is unable to identify any Dependents or Legal Personal Representative of a deceased member, the Trustee may pay the benefit to a person with a fair claim to the benefit<sup>30</sup>.

The Difference Between a Payment Directly to a Dependant and Payment to the Legal Personal Representative

*Overview*

36. If the death benefit is paid directly to a Dependant of the deceased member, the death benefit will not form part of the deceased member's estate and is therefore not subject to a family provision claim under the *Succession Act 1981*<sup>31</sup> or to any creditors of the estate.
37. If the death benefit is paid to the deceased member's Legal Personal Representative, then the death benefit forms part of the member's estate for distribution in accordance with the terms of the Will or the intestacy provisions. As an asset of the estate the death benefit is subject to a family provision claim under the *Succession Act 1981* and to any creditors of the estate.

*Creditors of the Estate*

38. If a death benefit is paid to the legal personal representative it will be subject to claims by creditors of the estate (persons to whom the member owed money at the date of their death).
39. If the trustee is considering making payment to the legal personal representative, and there is another option available it is essential that inquiries be made and the trustee receives strong evidence to the effect that the estate is solvent - that the value of assets in the estate exceeds the total liabilities.

Family Provision Claims

*What is a Family Provision Claim?*

40. A deceased person's spouse, child, or dependant may apply to the Supreme Court for an order that a provision or further provision be made out of the estate of the deceased person. An application can be brought whether the deceased dies with or without a will.

*Relevance of the Trustee's Decision to Pay the Benefit to the Estate*

41. If the Trustee determines to pay the death benefit to the member's Legal Personal Representative, then the death benefit forms part of the deceased member's estate for distribution in accordance with the terms of the Will or the intestacy provisions.
42. The right of a person to bring an application for family provision will only become relevant to distribution of a death benefit, where the Trustee makes or proposes to make a decision to pay the death benefit or some part thereof to the member's Legal Personal Representative.
43. If the death benefit is paid directly to a Dependant of the deceased member, the death benefit does not form part of the estate and is not subject to a family provision claim.
44. The Trustee needs to be mindful therefore that in circumstances where there is disagreement between a deceased person's spouse, child or dependants, as to the adequacy of the provision made for them out of the deceased's estate (whether under Will or on intestacy), then one or more of them can make an application for family provision.

*Who May Apply for Further Provision?*

45. The *Succession Act 1981* has different definitions which differ from the SIS legislation as to who qualifies as a spouse, child or dependant. The relevant definitions are set out below.
- 'Spouse' means:
    - a person who was married to the deceased immediately prior to the death of the deceased; or

---

<sup>30</sup> SIS Regulation 6.22(3) and Clause 11.8(e) of the Trust Deed.

<sup>31</sup> Or similar legislation in other jurisdictions.

- a person who, at the time of the deceased's death, had been living with the deceased as a couple on a 'genuine domestic basis' for a period of 2 years; or
- a person who has been divorced from the deceased, and who did not remarry before the deceased's death, and who was receiving or entitled to receive maintenance from the deceased at the time of the deceased's death.
- 'Child' means any child, stepchild, or adopted child of the deceased whatever their age.
- 'Dependant' means:
  - Any person who was being wholly or substantially maintained and supported by the deceased person at the time of the deceased's death; and
  - A parent of the deceased; or
  - The parent of a surviving child under the age of 18 years of the deceased person;
  - A person under the age of 18 years; and
  - A de facto spouse who does not fall within the definition in the Succession Act 1981 but who is financially dependent on the deceased member.

#### *When Must a Family Provision Claim be Brought?*

46. In Queensland an application for provision must be filed in Court within 9 months of the death of the deceased. The court may grant an extension to this time limit but will not do so unless the applicant shows that they were initially not aware of their rights and acted promptly once they became aware.

#### *Interaction Between the Family Provision Claim and AFCA*

47. AFCA may exercise its discretion to exclude a complaint if there is a more appropriate place to deal with it, such as a court. Or, if the person making the complaint has already commenced legal proceedings in relation to the subject matter of the complaint.

#### Grants of Probate or Letters of Administration

##### *Effect of a Grant of Probate or Letters of Administration*

48. Where a person dies leaving no Will or a Will that does not validly appoint an executor or a Will appointing an executor, but that executor dies or is unwilling or unable to act, the person's estate is administered by persons appointed by the court and called an *Administrator*.
49. A Grant of Probate (Probate) or Letters of Administration (LOA) is the official recognition of the right of the persons named in the grant to administer the deceased's estate and of the vesting in them of the title to those assets passing to them upon the death or grant.

#### *When is Probate or LOA Necessary?*

50. Whether Probate or LOA are required is a decision for the entity which has responsibility for the asset of the deceased (such as a bank or a company in which the deceased held shares) (Estate Asset Company) and the Trustee.
51. If no Estate Asset Company requires a Probate or LOA the Trustee will be influenced in its decision whether to require a grant by:
- The amount of the death benefit;
  - The knowledge that a court will not issue Probate or LOA unless certain requirements are met all of which are intended to establish the proper entitlement of the Legal Personal Representative to act; and
  - Where there is a Will that is the last valid Will of the deceased.
52. The Trustee may waive the requirement for production of Probate or LOA in which event the Trustee will likely require the Legal Personal Representative (where the deceased left a Will) or in the case of intestacy, the beneficiaries of the death benefit, to sign a document which indemnifies the Trustee.

#### *Protection Provided by Probate or LOA*

53. Even when it is possible to deal with all the assets of the estate without obtaining Probate or LOA, an executor or the person entitled on intestacy may elect to apply for Probate or LOA to obtain the protection afforded to a Legal Personal Representative with a Grant.<sup>32</sup>

---

<sup>32</sup> Section 53(4) of the *Succession Act 1981*.

54. Under these arrangements the Legal Personal Representative who in good faith and without negligence has sought and obtained Probate or LOA is not liable for any amounts paid or assets distributed in good faith and without negligence in reliance on the grant.

*Grant of Letters of Administration*

55. Where a person dies leaving:
- no Will; or
  - a Will that does not validly appoint an executor; or
  - a Will appointing an executor, but that executor dies or is unwilling or unable to act,
- then a person may apply to the court for a Grant of Letters of Administration to confirm their entitlement to administer the estate.
56. The decision to apply will usually arise from:
- a requirement of an Estate Asset Company; or
  - the desire of the person to obtain the protection afforded by a Grant of Letters of Administration.
57. An Estate Asset Company may not be prepared to transfer ownership of assets without sighting a Grant of Letters of Administration.
58. The Queensland rules of court (known as the *Uniform Civil Procedure Rules 1999*) set out in descending order of priority, the people to whom the Court may grant Letters of Administration in instances of intestacy. These are:
- surviving spouse (including a de facto partner);
  - children;
  - grandchildren or great grandchildren;
  - parents;
  - brothers and sisters;
  - children of brothers and sisters;
  - grandparents;
  - uncles and aunts;
  - first cousins; and
  - anyone else the court may appoint.

*Grant of Probate*

59. Where there is a valid Will the executor appointed under a Will may apply to the court for a Grant of Probate to confirm their entitlement under the Will. The decision to apply will usually arise from:
- a requirement of an Estate Asset Company; or
  - the desire of the person to obtain the protection afforded by a Grant of Probate.

*Mechanics of Obtaining Probate or Letters of Administration*

60. While there are various forms of Probate and LOA, in making a grant the court will require as a minimum that:
- At least 14 days before the grant is applied for, notice of the intended application in the Approved form is published in the Queensland Law Reporter and in the relevant local newspaper;
  - At least 7 days before the grant is applied for, the notice of the intended application is served on the Public Trustee;
  - The application, the death certificate, the Will (if applicable) and various affidavits are filed with the court; and
  - Where the court requires additional explanatory affidavits.

## **Annexure 2: Guiding Death Benefit Principles**

### Overview

61. To ensure consistency and provide clarity for effective decision making, the Trustee has adopted a set of guiding death benefit principles for the distribution of death benefits.
62. These guiding principles apply to death benefit payments where there is no Binding Nomination by the member or a reversionary pension nomination. The principles are, of course, subject to the provisions of SIS, the Sunsuper Trust Deed and the general law.
63. These principles include:
  - tax payable on death benefits;
  - Sunsuper requirements for grants of probate and letters of administration;
  - a distribution guide;
  - a Decision Tree reflecting the operation of the distribution guide; and
  - a summary of the operation of the Queensland Intestacy laws.

### Tax on Death Benefits

64. Differing taxation implications may apply to individuals entitled to receive lump sum superannuation death benefits following the passing of a member.

### Beneficiary is 'Tax Dependant'

65. When a lump sum death benefit is paid to a beneficiary who is classified under taxation law as a 'tax dependant', the whole of the benefit is paid without any tax being deducted.
66. Different rules apply in determining who is a 'dependant' under:
  - superannuation law (for making a distribution of a death benefit); and
  - taxation law (determining who is required to pay tax on the benefit paid).
67. The result is that while no tax is payable by the following recipients of a death benefit:
  - the deceased's spouse or de facto spouse;
  - the deceased's former spouse or de facto spouse;
  - a child of the deceased under 18 years of age at the date of death;
  - a person who was financially dependent on the member; and
  - a person in an interdependency relationship with the deceased;tax is payable by a beneficiary who is the child of a member who was over 18 years of age at the date of death, unless they were either:
  - financially dependent on the deceased; or
  - in an interdependency relationship with the deceased.
68. A 'tax dependant' also includes a person who receives a benefit on the death of a member who died in the line of duty, such as a member of the defence force, the Australian Federal Police or the police force of a state or territory, or as a protective service officer

### Beneficiary is not a 'Tax Dependant'

69. However, when a death benefit is paid to a beneficiary who is not a 'tax dependant':
  - the tax-free component is not subject to tax; but
  - the taxable component (see below) is included in assessable income of the beneficiary, with a tax offset to ensure that:
    - the rate of tax on the element taxed in the fund does not exceed 15%; and
    - the rate of tax on the element untaxed in the fund does not exceed 30%.Medicare levy (2% of taxable income) is added where appropriate.
70. The tax-free and taxable components are largely determined having regard for the types of contributions made to a member's account:
  - taxable component; and/or
  - tax-free component - where the member has claimed a tax deduction on the amount of the contribution.

### Legal Personal Representative

71. Where the legal personal representative<sup>33</sup> of a deceased estate receives a superannuation death benefit on behalf of the estate:
- If the ultimate beneficiary in the estate (whether under a Will or on Intestacy) is a 'tax dependant' of the deceased, no tax will be payable on the benefit.
  - If the ultimate beneficiary is not a tax-dependant of the deceased, the legal personal representative will pay tax at the rates applicable to beneficiaries who are not tax dependants.

The legal personal representative is required to withhold the appropriate amount of tax from the benefit and remit it to the ATO (*Interpretative ruling 11-350*).

### Sunsuper Requirement for Probate or LOA

#### *Overview*

72. Where the death benefit is to be paid to the LPR of the member, SunsUPER does not require the production of a Grant of Probate or LOA if the death benefit is less than \$50,000.
73. Where the death benefit is \$50,000 or more, SunsUPER will, in connection with the initial decision, request the production of a Grant of Probate or LOA (Requirement).

#### *Cost of Obtaining Probate or LOA*

74. As at January 2020 the costs associated with obtaining a grant were:
- the advertising - \$171.60, and
  - Supreme Court filing fees - \$722.60, and
  - any legal costs in drafting and filing the application and affidavits - which will vary depending on which firm performs the work.
- The legal fees may range from as low as \$1,000 up to \$5,000 or more.
75. If an objection is raised, it will usually be on the basis that the cost of obtaining the grant is not justified having regard for the fact that the assets of the estate are not significant and that no other party has required that a grant be obtained.

#### *Objection to Obtaining LOA*

76. Where the member dies intestate and an objection is received to a request that LOA be obtained, it will usually receive favourable consideration on the basis that:
- the decisions of AFCA and the SCT are to the effect that a trustee is not entitled to insist on LOA because, provided reasonable inquiries have been made to locate all potential beneficiaries, the trustee is protected at law, from a late claim; and
  - suitable warranties and indemnities can be obtained from the beneficiaries.
77. Provided reasonable investigations have been carried out to locate all potential beneficiaries it is SunsUPER's practice to waive the Requirement on the basis that a suitable deed of release and indemnity will be signed by the beneficiary/ies.

#### *Objection to Obtaining Probate*

78. However, the situation differs where the member has left a Will because of the possibility that:
- the Will may not be valid and may be challenged because for example:
    - the member did not have the mental capacity to make the Will;
    - the Will does not represent the wishes of the member, because it was signed as a result of undue pressure or influence;
    - the Will has not been validly signed and witnessed;
  - a later Will, which revokes the Will relied on by SunsUPER, is found after the death benefit has been distributed; and
  - SunsUPER may be required to pay the death benefit twice.
79. In this scenario SunsUPER will consider the following factors in deciding whether to waive the Requirement:
- the amount of the death benefit;
  - the assets in the estate and their value;

---

<sup>33</sup> Referred to in the Income Tax Assessment Act 1937 as a trustee.

- the presence or absence of any disputation between the parties named in the Will whether they be the executor or the beneficiaries;
- the likelihood of a family provision application being made, including whether the time for filing such an application in Court has passed;
- whether an executor has been appointed by the Will;
- whether the executor appointed by the Will is alive and is prepared to act in that capacity and discharge their duties to administer the estate;
- whether the Will has been prepared by lawyers who have also been involved in the execution and witnessing of the Will;
- whether the executor/s to whom the benefit is to be paid is/are prepared to sign the form of deed of release and indemnity requested by Sunsuper.

#### *Distribution Guide*

80. This guide has been developed to assist the decision-making of Sunsuper personnel in the exercise of the trustee's discretion in relation to the first decision by the trustee as to whom a benefit should be paid on the death of a Fund member.

81. In making each decision, Sunsuper will have regard for the relevant principles for distribution of death benefits including but not limited to the following:

- the purpose of superannuation as enunciated by AFCA<sup>34</sup>  
*primarily to provide for those people who were financially reliant on the deceased member at or around the date of death and who might have expected continuing financial support from the member into retirement, but for the member's death.*
- the wishes of the deceased member.

82. In this guide:

'current spouse' means:

- A de-facto spouse of the member at the date of death;
- A person to whom the member was lawfully married and with whom the member was living on a genuine domestic basis at the date of death; and
- A person with whom the member had been living on a genuine domestic basis in a relationship as a couple, but from whom the member was temporarily living apart (for example because of work, being incarcerated or a trial period of separation).

It does not include a person to whom the member is still married at the date of death, but the relationship has ended, and with whom the member was not living.

'Next of kin' means<sup>35</sup>:

- the brothers and sisters of the member;
- the grandparents of the member;
- brothers and sisters of a parent of the member;
- the children of any brothers or sisters of the member who die before the member; and
- the children of any brothers or sisters of a parent of the member who die before the member.

83. Sunsuper personnel shall have regard for the following in making the initial decision on a death benefit claim. For operational and management purposes, each of the circumstance has been allocated an identifier.

#### Clause 1(a) (i)

*Clause 1(a) (i): Where there is no current spouse, no known dependants a Legal Personal Representative is present, and the benefit amount does not exceed \$50,000.*

The Trustee will pay the death benefit to the Legal Personal Representative provided:

- There is no current Spouse;
- There are no known dependants; and
- The Will is a valid Will and has not been revoked; or
- Where Letters of Administration have been granted.

---

<sup>34</sup> In the AFCA approach to superannuation death benefit complaints.

<sup>35</sup> Section 35(1A) of the *Succession Act 1981 (Qld)*.

Clause 1(a) (ii)

*Clause 1(a) (ii): Where there is no current spouse, no known dependants the deceased left a Will of which probate has not been obtained and the benefit amount exceeds \$50,000.*

The Trustee will request that the executor/s obtain a grant of probate of the Will, will wait until a grant has been obtained and upon production of the grant, the Trustee will pay the benefit to the Legal Personal Representative provided:

- There is no current spouse;
- There are no known dependants; and
- The member left a Will of which probate has been obtained; and the benefit amount exceeds \$50,000.

Clause 1(a) (iii)

*Clause 1(a) (iii): Where there are known dependants and no current spouse.*

The Trustee will pay the death benefit to one or a combination of dependants where multiple dependants exist provided:

- there is no current spouse;
- there are Dependants (who may fall in any of the following categories):
  - Children under and over 18 years of age;
  - Person(s) deemed financially dependent; or
  - Person(s) deemed as being an interdependent with the member.

Clause 1(b)

*Clause 1(b): Where the member has made a preferred nomination but there is no current spouse, known dependants or Legal Personal Representative. Where the total benefit amount exceeds \$50,000.*

The Trustee will request the claimant(s) to take out Letters of Administration, the Trustee will wait until a Legal Personal Representative has been appointed, upon which the Trustee will pay the benefit to the Legal Personal Representative for distribution when;

- There is no current spouse;
- There are no known dependants;
- Letters of Administration have been obtained; and
- The total benefit amount is \$50,000 or more.

Clause 1(c)

*Clause 1(c): Where a member has made a preferred nomination but there is no current spouse, known dependants or Legal Personal Representative. Where the total benefit amount does not exceed \$50,000.*

The Trustee will pay the benefit to the Nominated Preferred Beneficiary, Next of Kin and/or any other person/s the Trustee considers has a fair claim to the benefit provided;

- There is no current spouse;
- There are no known dependants;
- There is no Legal Personal Representative; and
- The total benefit amount does not exceed \$50,000.

Clause 1(d)

*Clause 1(d): Where a member has made no preferred nomination, there is no current spouse, known dependants or Legal Personal Representative. Where the total benefit amount exceeds \$50,000.*

Where:

- The member has made no preferred nomination; and
- There are none of the following:
  - Current spouse;
  - Known dependants; or
  - Legal Personal Representative; and



- The total benefit exceeds \$50,000; the Trustee will request the claimant(s) to take out Letters of Administration, the Trustee will wait until a Legal Personal Representative has been appointed, upon which the Trustee will pay the benefit to the Legal Personal Representative.

#### Clause 1(e)

*Clause 1(e): Where a member has made no preferred nomination, there is no current spouse, known dependants or Legal Personal Representative. Where the total benefit amount does not exceed \$50,000.*

Where:

- The total benefit does not exceed \$50,000;
- The member has made no preferred nomination; and
- There are none of the following:
  - Current spouse;
  - Known dependants; or
  - Legal Personal Representative;

the Trustee will pay the benefit to:

- Next of kin and/or;
- Other person(s) who may have a fair claim to the benefit.

#### Clause 1(f)

*Clause 1(f): Where a member has made no preferred nomination, there is no current spouse, known dependant, Legal Personal Representative or next of kin or other person with a fair claim. Where the total benefit amount does not exceed \$50,000.*

The Trustee will pay the benefit to the Australian Taxation Office (ATO) or Estate *bona vacantia* where appropriate in circumstances where none of the following are present;

- Current spouse;
- Known Dependants (including a separated lawful spouse);
- Legal Personal Representative;
- Next of kin;
- Any other person(s) with a fair claim to the benefit or; and
- Claimant.

#### Clause 2(a)

*Clause 2(a): Where there is a current spouse and the benefit amount does not exceed \$25,000.*

The Trustee will pay 100% of the benefit to current spouse when:

- The total benefit does not exceed \$25,000 regardless of whether there are other dependants present.

#### Clause 2(b)

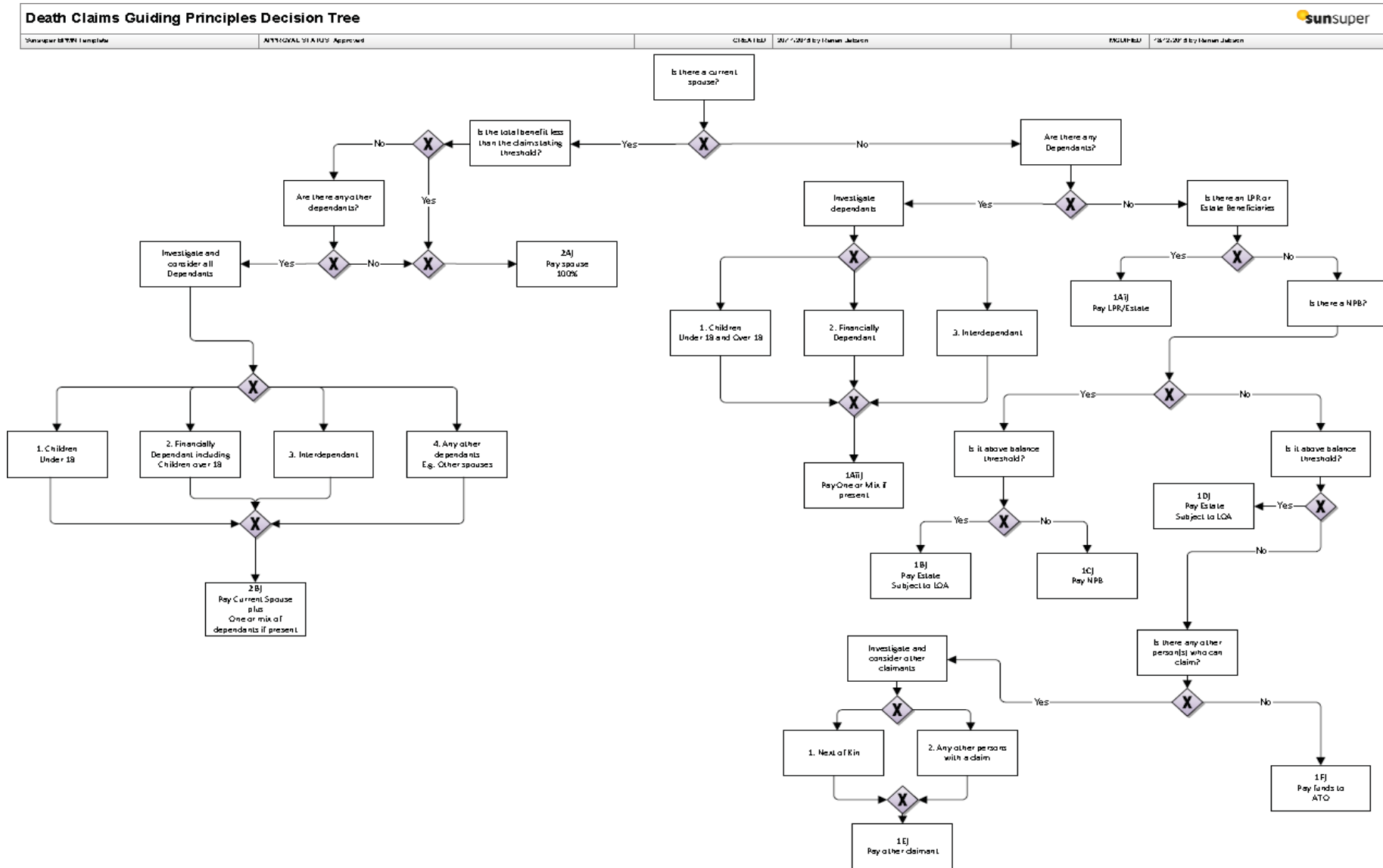
*Clause 2(b): Where there is a current spouse and other known dependants.*

The Trustee will pay the benefit to:

- The current spouse; and
- One or a combination of dependants where multiple other known dependants exist,

The duration of the spousal relationship and the circumstances of and the level of dependency of the other dependants will be considered when determining distribution in these instances.

Distribution Decision Tree



Intestacy Provisions under the Succession Act 1981(Qld)Summary of the Rules of IntestacyMeaning of Intestacy

84. If a person dies without a Will or without a valid Will the person is said to have died *Intestate*.

How the Estate is Distributed on Intestacy

85. In this case the rules contained in the Succession Act 1981 (relevant to Queensland) decide how the assets of the estate will be distributed. Under these rules, assets are distributed to people according to their kinship proximity to the deceased.

86. The rules of intestacy are summarised in the flow chart attached as Annexure 1.

87. It is important that the Trustee understands the way in which these provisions work as they will be relevant to the Trustee in deciding whether the benefit of a member who dies intestate should be:

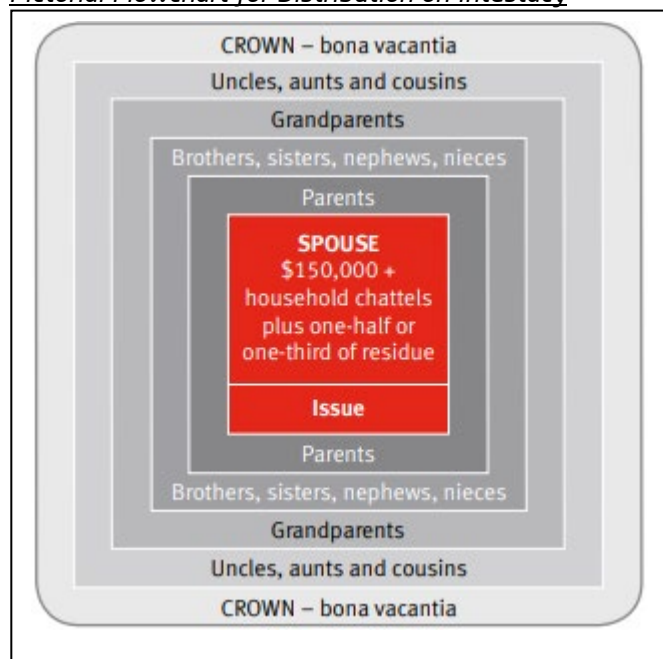
- Paid to the member's Legal Personal Representative to be distributed in accordance with the rules of intestacy in the *Succession Act*; or
- Paid direct to the member's *Dependant(s)* (as defined in SIS and the Trust Deed).

Who is a De Facto Spouse for Intestacy?

88. Under the *Succession Act*, a de facto spouse of a deceased person is a person who, at the time of the deceased's death, had been living with the deceased as a couple on a 'genuine domestic basis'<sup>36</sup> for a period of 2 years; under SIS there is no prescribed time period, although the duration of the relationship is a matter to be taken into account in:

- determining whether a de facto relationship exists, and
- the share of the death benefit which ought to be paid to the de facto partner.

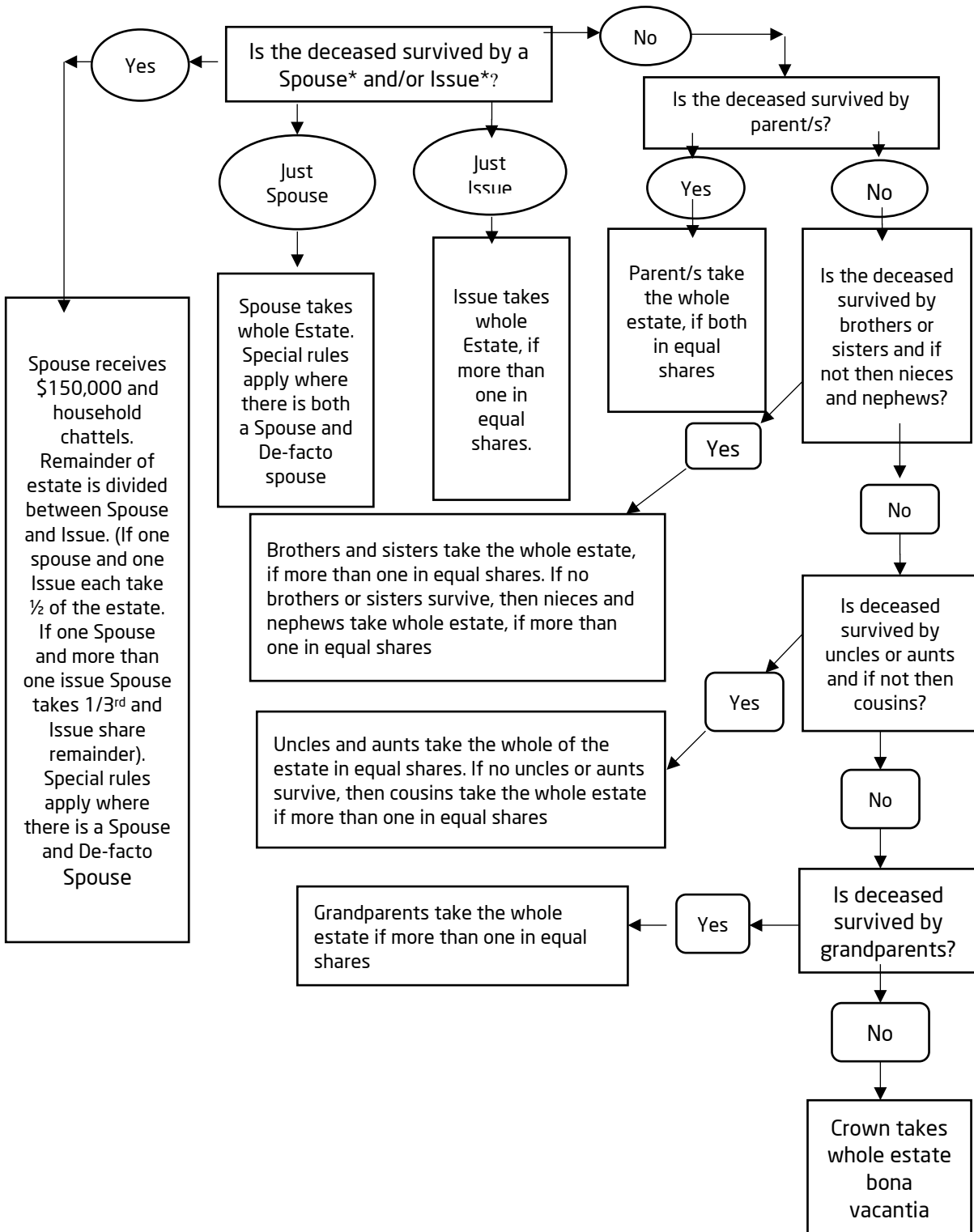
Therefore, a person who would qualify as a de facto spouse under SIS may not qualify under the *Succession Act* where the period of co-habitation is less than 2 years.

Pictorial Flowchart for Distribution on Intestacy

<sup>36</sup> See Section 5AA of the *Succession Act 1981* and Section 32DA of the *Acts Interpretation Act 1954*.

Linear Flowchart for Distribution on Intestacy

Flowchart of Intestacy Provisions under the Succession Act 1981(Qld)



Meanings of Terms on Intestacy Distribution

"*Spouse*" includes both a person legally married to the deceased and a de facto spouse, being a person who, at the time of the deceased's death, was living with the deceased as a couple on a 'genuine domestic basis' for a period of 2 years.

"*Issue*" includes the deceased's children, grandchildren and all other lineal descendants.

"*Child*" includes any child, stepchild or adopted child of the intestate. A 'step relationship' is not broken if the child's natural parent died prior to intestacy.

The order in which issue are entitled to a benefit is set out in s36A of the *Succession Act 1981* and is described as a "per stirpes" distribution. Under *per stirpes*, no child can take concurrently with their parent. For example:

- if X dies intestate leaving children A, B, and C, the children would share the estate in equal thirds regardless of whether there are living grandchildren.
- However, if child B predeceased X leaving issue B1 and B2 and C has grandchildren C1 and C2, then by *per stirpes* division:
  - X's surviving children A and C would still take one-third;
  - B's issue B1 and B2 would take one-sixth each (sharing equally B's one-third entitlement) and C's grandchildren C1 and C2 would receive nothing as their grandparent C survived X.

### **Annexure 3 - Challenge to Trustee's Decision**

89. This document provides an overview of the circumstances in which the Trustee's decision can be challenged.

#### Which Jurisdiction

90. The Trustee's decision in relation to the exercise of its discretion can be challenged in the Supreme Court, the Australian Financial Complaints Authority (AFCA), or, if the complaint was made before 1 November 2018, the Superannuation Complaints Tribunal (SCT).
91. The SCT and more recently AFCA were introduced to provide a non-legal alternative to Financial Service Providers and their customers (or members) to resolve complaints without the need to proceed to litigation.
92. AFCA's purpose<sup>37</sup> is to:  
*To provide fair, independent and effective solutions for financial disputes.*
93. Sunsuper embraces AFCA's purpose and we strive to adopt a co-operative approach in dealing with both AFCA and our members. We approach complaints with a view to attempting to achieve early resolution to all areas of disputation with a member.

#### Australian Financial Complaints Authority (AFCA)

##### *Right to Challenge Trustee's Decision*

94. If the Trustee has made a decision in relation to distribution of the death benefit of a deceased member, a potential beneficiary may make a complaint to AFCA that the decision was unfair or unreasonable.<sup>38</sup>
95. AFCA may also consider complaints about the validity of a binding nomination.

##### *Right to Challenge Restricted in the Case of a Death Benefit*

96. A person cannot make a complaint to AFCA about a decision that relates to the payment of a death benefit, unless all of the following are satisfied:
- the person has an "interest in the death benefit"<sup>39</sup>; and
  - the trustee has given the person notice of a proposed decision and that the person may object to the decision within 28 days; and
  - the person has objected within the 28-day period<sup>40</sup>; and
  - the trustee has given the person notice of its decision and that the person may make a complaint to AFCA within 28 days; and
  - the person has made a complaint to AFCA within that period.<sup>41</sup>
97. The *Corporations Act 2001* does not define who 'has an interest' in a death benefit. However, AFCA's 'Transitional Superannuation Guide' is to the effect<sup>42</sup> that a person will have such an interest if they are within the class of people eligible to receive all or part of the death benefit under the governing rules of the super fund.
98. Having regard for the terms of the Sunsuper trust deed a person will have an interest in a death benefit if they are:
- a Legal personal representative or a 'dependant' of the deceased member; or
  - if neither of the above can be located, a person with a 'fair claim' as provided for in clause 11.8 of the trust deed.
99. It follows that if a person is not a legal personal representative or a 'dependant' of the deceased member, or if neither a LPR nor a dependant can be found, the person does not have a fair claim to the benefit, the person is not entitled to make a complaint to AFCA.
100. While section 1056(2) of the *Corporations Act 2001* does not make it mandatory for a trustee to attend to what is known as 'claim staking', the requirement may be inferred from section 1056 of the Act. Further an aim of the process is to protect a trustee against having to pay part or all of a death benefit twice. It follows that best practice dictates the Trustee gives written notice to every person who could have an interest in the death benefit.

---

<sup>37</sup> See AFCA website

<sup>38</sup> Section 1053(1)(j) of the *Corporations Act 2001* (Cth).

<sup>39</sup> Section 1056(1) of the *Corporations Act 2001* (Cth).

<sup>40</sup> Section 1056(2)(a) of the *Corporations Act 2001* (Cth).

<sup>41</sup> Section 1056(2)(b) of the *Corporations Act 2001* (Cth).

<sup>42</sup> At page 92 under the heading 'Who can submit a superannuation complaint?'

*AFCA's Procedures on Receipt of a Complaint*

101. On receipt of a complaint, AFCA will notify the Trustee that a complaint has been made.
102. AFCA will request further information about the complaint, including the reasons for the Trustee decision, the evidence this was based upon, and, for copies of each notice posted to the interested parties to be provided to them.
103. Within 28 days of being notified of the complaint, AFCA will also expect the Trustee to notify all interested parties that they may apply to AFCA within 28 days to be joined as a party to the complaint.
104. AFCA may arrange a conciliation between the Trustee and joined parties to settle the complaint, if they believe it is appropriate or worthwhile. These are generally held by teleconference. If at, or after the conciliation conference, the parties agree on the terms of a settlement of the complaint and those terms are put in writing signed by or on behalf of the parties and lodged with AFCA, they will close the complaint.
105. If a complaint is not settled by conciliation, AFCA will distribute a Preliminary Assessment of the complaint, which provides a recommendation as to how the complaint should be resolved. The Trustee and joined parties are provided with 28 days to accept or reject their recommendation.
106. If all parties accept the Preliminary Assessment, the complaint will be closed. However, if a party rejects the Preliminary Assessment, the matter will proceed to a final decision by an AFCA decision maker or ombudsman.

*AFCA's Decision-Making Powers*

107. In making a determination, AFCA has all the powers, obligations and discretions that are conferred on the Trustee who made the decision.
108. AFCA must affirm the decision if it is satisfied that the decision, in its operation in relation to the complainant and any other joined party, was fair and reasonable in the circumstances.<sup>43</sup>
109. If AFCA is satisfied that a decision is unfair or unreasonable, or both, AFCA may;
  - vary the decision, or
  - set aside the decision and substitute a decision for the decision set aside.<sup>44</sup>
110. AFCA must not make a decision that would be contrary to law, or, the governing rules of the fund (i.e. Sunsuper's Trust Deed).<sup>45</sup>

---

<sup>43</sup> Section 1055(3) of the Corporations Act 2001 (Cth).

<sup>44</sup> Section 1055(5) & 1055(6) of the Corporations Act 2001 (Cth).

<sup>45</sup> Section 1055(7) of the Corporations Act 2001(Cth).