

Sunsuper Pty Ltd

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

Claims Committee Charter

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1. Introduction

This charter outlines the purpose, authority, responsibilities, composition and meetings of the 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 is to provide oversight of the Sunsuper Superannuation Fund's ("Fund") Death, Disability and Terminal Illness claims and provide recommendations for any improvement to the effectiveness of claims management.

This function includes the monitoring of claims decisions made under delegation, the review and making of decisions in relation to select claims as required and, for self-insurance claims, consideration of any claims recommendations made by the relevant employer representative on behalf of the employer.

As part of the oversight function, the Committee will meet monthly to review claims for decision as per delegations and meet at least quarterly to review key statistics relating to claims activity and trends. . The Committee will also review the Internal Delegation Instructions, the Death Benefit Guiding Principles and Claims Handling Principles on an annual basis.

The Board will evaluate the Committee's and individual members' performance annually.

3. Authority

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

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;
- Giving proper regard to industry and regulatory reviews as related to claims practices within superannuation;
- Oversight of the claims experience and performance in relation to internal standards and service provider agreements;
- Sunsuper's Risk Management Framework; and
- Good Corporate Governance.

4. Responsibilities

The Committee will:

- a) Make decisions on behalf of the Board in relation to the distribution of Death claims and the assessment of Disability and Terminal Illness claims;
- b) Identify and consider risks, litigation, complaints, industry trends and any legislative change relating to claims; and
- c) Review effectiveness of Sunsuper's claims' framework and make recommendations for any improvements.

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) Evaluate the Committee's and individual members' performance 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 two directors.

An external independent member may be appointed to the Committee as the "Claims Committee Independent Expert" on the recommendation of the members of the Committee and the approval of 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 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 Customer Relationships or delegate, and the Head of Product & Actuarial or delegate, and act as per the delegations included in Appendix 1.

Quorum for Advisory Committee of Management

Advisory Committee of Management decisions made under delegation require two of either the Sunsuper General Counsel, Head of Customer Relationships or Head of Product and Actuarial, or their nominated delegates to reach an agreement.

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.

5.2 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 reasonably be perceived to materially interfere with, the exercise of their unfettered and independent judgement.

A relationship is "material" if, in the judgement of the Board, it would interfere with the member's independent judgement.

Members shall 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 judgement.

Appointment 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 judgement. 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 representative directors and member representative 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

The Company Secretary or delegate, Head of Customer Relationships or delegate and any other persons considered appropriate shall attend meetings of the Committee, as necessary.

6.3 Secretarial

The Leader, Claims Review 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 Quorum

The quorum for the transaction of business at any meeting of the Committee will be determined as follows:

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

A resolution of Committee members is passed if at least two-thirds of the members present at the meeting 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.

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

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

(Consolidated as at 21 June 2018, effective 21 June 2018).

Executive Summary

The Board of Sunsuper delegates to the Committee constituted as a Committee of the Board (“Claims Committee” or “Committee”) the authority to make claims decisions for death, disablement and early release benefits for Sunsuper members in accordance with the below delegations.

This delegation operates in conjunction with delegations to the Chief Executive Officer, Sunsuper General Counsel, Head of Customer Relationships, Head of Product and Actuarial and the Administrator (*for the purposes of clarity in exercising this delegation, the “Administrator” comprises any staff member from the claims or customer payments teams*) (also set out below).

In summary:

	SCT Conciliation Outcomes	Self- Insured Claims	Death Claim Payments in exigent circumstances	Approved Insurance Claims	Death/ Disability/ Early Release Initial Decisions	Death/ Disability/ Early Release Resubmissions
Claims Committee					No agreement by ACM	
CEO						
Administrator						
Sunsuper General Counsel/ Head of Customer Relationships / Head of Product & Actuarial (ACM)	Company Secretary				Agreement by ACM	Agreement by ACM*

**Resubmissions for Death claims only where an objection has been received to obtaining a Grant of Probate or Grant of Letters of Administration*

The Committee may decide that a particular death, disablement or early release benefits claim should not be determined by the Committee but should be referred to the Board for determination.

Death, Disablement and Early Release Benefits

Self-Insurance

The Committee will consider 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 Committee for the purposes of consideration of self-insured claims.

Delegations for Death Benefits

Subject to the delegations of authority otherwise contained in this document, the Board delegates to the Committee 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 Administrator to pay the death benefit to the recipient/s determined by the Committee; 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

Subject to the delegations of authority otherwise contained in these delegations, the Board delegates to the Committee 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 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 Administrator to correspond with the Insurer requesting reconsideration of a claim if:
 - i. The insurer has refused the claim; and
 - ii. The Committee forms an opinion that the available evidence is not sufficient to support the refusal of the claim.

This includes authority to give instructions to the 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

Subject to the delegations of authority otherwise contained in these delegations the Board delegates to the Committee the following authorities in relation to assessment and payment of claims for payment of benefits 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 Administrator to pay an Early Release claim.

Referrals to the Board

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

The Committee must refer to the Board any claim for a disablement benefit where the Committee 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.

Committee's Deliberations

In making a determination, the Committee must consider:

- The recommendations of the Claims team; and

- The decision of the Fund's Insurer or for self-insured claims any recommendation of the Employer representative.

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

Delegations of Authority for Chief Executive Officer

Benefit Payment Claims

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 Chief Executive Officer (or delegate) must consider the recommendation of the Administrator in assessing all benefit claims.

Delegations of Authority for Claims Administration and Customer Payments

Claims Administration and Customer Payments

To pay:

- Total and permanent disablement claims (consisting of the member's account balance and the insured amount);
- Terminal medical condition claims (consisting of the member's account balance and the insured amount); and
- Total disability (salary continuance) claims (consisting of the insured amount only);

Where the Fund's Insurer has determined to accept, and pays, an insured claim.

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.

Delegations of Authority for Sunsuper General Counsel

Benefit Payment Claims

To approve distribution recommendation and payment of claims for all death claims (first submissions and resubmissions where an objection has been received to appointing a Legal Personal Representative) in accordance with law, the relevant Trust Deed and the Guiding Death Benefit Principles.

To approve payment of all claims for early release of benefits on compassionate grounds.

To approve Superannuation Complaint Tribunal conciliation outcomes.

To approve payment of claims for Permanent Incapacity or Terminal Medical Condition.

To confirm the validity of Binding Death Benefit Nominations in accordance with law and the relevant Trust Deed and the Guiding Death Benefit Principles, and if confirmed as valid, to approve payment in accordance with the nomination.

To form an opinion in relation to:

- Whether or not any member suffers Total and Permanent Disablement, or Total Disablement, as defined in the Trust Deed and the applicable policy of insurance; and
- Whether or not a condition of release has been satisfied in relation to a member in terms of the Superannuation Industry (Supervision) Act 1993.

To form an opinion in relation to:

- Whether or not any member suffers Permanent Incapacity, as defined in the Trust Deed; and
- Whether or not a condition of release has been satisfied in relation to a member in terms of the Superannuation Industry (Supervision) Act 1993.

The rules for exercise of these delegations are:

- a. The Sunsuper General Counsel (or delegate), in consultation with the Head of Customer Relationships (or delegate) and the Head of Product and Actuarial (or delegate), together constituting the Advisory Committee of Management, must consider the recommendation of Claims Administration in assessing all death benefit claims (first submissions and resubmissions

where an objection has been received to appointing a Legal Personal Representative) and declined insurance claims; and

- b. The Sunsuper General Counsel (or delegate) may approve payments of claims:
- For early release of benefits on compassionate grounds;
 - For Permanent Incapacity;
 - For Terminal Medical Condition;
 - In accordance with Binding Death Benefit Nominations;
- after considering the recommendation of the Administrator.

Referrals to the Claims Committee

In the instance that consensus agreement is not reached between the Sunsuper General Counsel (or delegate) the Head of Customer Relationships (or delegate) and/or Head of Product & Actuarial (or delegate) 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 Advisory Committee of Management members, but should be referred to the Committee for determination.

Delegations of Authority for Head of Customer Relationships and Head of Product & Actuarial Benefit Payment Claims

To approve distribution recommendation and payment of claims for all death claims (first submissions and resubmissions where an objection has been received to appointing a Legal Personal Representative) in accordance with law, the relevant Trust Deed and the Guiding Death Benefit Principles.

To approve payment of all claims for early release of benefits on compassionate grounds. To approve payment of claims for Permanent Incapacity or Terminal Medical Condition.

To confirm the validity of Binding Death Benefit Nominations in accordance with law and the relevant Trust Deed and the Guiding Death Benefit Principles, and if confirmed as valid, to approve payment in accordance with the nomination.

To form an opinion in relation to:

- Whether or not any member suffers Total and Permanent Disablement, or Total Disablement, as defined in the Trust Deed and the applicable policy of insurance; and
- Whether or not a condition of release has been satisfied in relation to a member in terms of the Superannuation Industry (Supervision) Act 1993.

To form an opinion in relation to:

- Whether or not any member suffers Permanent Incapacity, as defined in the Trust Deed; and
- Whether or not a condition of release has been satisfied in relation to a member in terms of the Superannuation Industry (Supervision) Act 1993.

The rules for exercise of these delegations are:

- a. The Head of Customer Relationships (or delegate), in consultation with the Company Secretary (or delegate), and the Head of Product and Actuarial (or delegate), together constituting the Advisory Committee of Management must consider the recommendation of Claims Administration in assessing all death benefit claims (first submissions and resubmissions where an objection has been received to appointing a Legal Personal Representative) and declined insurance claims; and
- b. The Head of Customer Relationships (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.

Referrals to the Claims Committee

In the instance that consensus agreement is not reached between the Sunsuper General Counsel (or delegate) the Head of Customer Relationships (or delegate) and/or Head of Product & Actuarial (or delegate) 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 Advisory Committee of Management members, but should be referred to the Committee for determination.

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.

Consolidated Delegation

- Revised to incorporate Board resolutions of 8 October 2008
- Revised to incorporate Board resolutions of 10 November 2008
- Revised to further clarify Board resolutions of November 2008
- Revised to incorporate Board resolutions of January 2009
- Revised to incorporate Board resolutions of 8 September 2010
- Revised to incorporate Board resolutions of 1 August 2012
- Revised to incorporate Board resolutions of 11 December 2013
- Revised to incorporate Board resolutions of 10 December 2014
- Revised to incorporate Board resolutions of 26 August 2015
- Revised to incorporate Board resolutions of 22 June 2016
- Revised to incorporate Board resolutions of 16 August 2016
- Revised to incorporate Board resolutions of 17 February 2017
- Revised to incorporate Board resolutions of 21 June 2018

Appendix 2: Guiding Death Benefit Principles

Background

The Trust Deed regulating Sunsuper provides for the payment of a death benefit from the Fund on the death of a member. ¹This is a recognised core purpose of a regulated superannuation fund and in keeping with the sole purpose test in the Superannuation Industry (Supervision) Act 1993 ("SIS").²

On joining Sunsuper members are given the option of lodging a Preferred Beneficiary Nomination or a Binding Death Benefit Nomination. On at least an annual basis (with the annual Member Statements), members are asked whether they want to update their nomination, and those who have made a Binding Nomination are informed when their Binding Nomination is due to expire.

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.

This document provides an overview of:

- The law in relation to the payment of death benefits, including the extent of the discretion that the Trustee has in relation to Preferred Beneficiary Nominations and the validity of Binding Nominations;
- The circumstances in which the Trustee's decision can be challenged and the steps the Trustee can take to reduce the likelihood of challenge; and
- The guiding principles for the distribution and payment of death benefits of Sunsuper members.

Death Benefits

1 To whom are Death Benefits Payable from Sunsuper

1.1 *Trust Deed*

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;
- 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.³
- 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 SIS.⁴

1.2 *Binding Nominations*

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.

In order for a Binding Nomination to be valid the Nomination must:

- Comply with the form and content requirements in SIS, 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; and

¹ Clause 11.4(d) of the Trust Deed.

² Section 62(1) (a) (iv) of the Superannuation Industry (Supervision) Act 1993.

³ Clause 11.8 of the Trust Deed. Clause 11.8 also provides for payment of a reversionary pension on the death of a member who is receiving a pension, where the member nominated a reversionary beneficiary on commencement of the pension and the nominated person is eligible to receive the pension on the member's death - nomination of a reversionary beneficiary is unusual, and is not dealt with in these Guiding Principles.

⁴ Clause 11.8(e) of the Trust Deed.

- The Nomination must contain a declaration, signed, and dated, by the witnesses stating that the notice was signed by the member in their presence⁵.
- 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.

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 confirmation of a Binding Nomination must be in writing, dated and signed by the member (there are no witness requirements for a confirmation).⁶

A Binding Nomination can be revoked at any time by notice in writing, dated and signed by the Member.

1.3 *Trustee's Discretion where there is no Binding Nomination*

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.

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.⁷ 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.

1.4 *The Difference between a Payment Directly to a Dependant and to the Legal Personal Representative*

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* or to any creditors of the estate.

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.

2 Who Qualifies as a Dependant

A Dependant of a member means a person who is, or was, at the relevant time:

- A Spouse of the member;
- A Child of the member;
- Dependent upon the member for maintenance or support; or
- In an Interdependency Relationship with the member.⁸

2.1 *Spouse*

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;⁹

⁵ Superannuation Industry (Supervision) Regulation 6.17A(6).

⁶ Superannuation Industry (Supervision) Regulation 6.17A(5).

⁷ Karger v Paul [1984] V.R 161.

⁸ Definition of Dependant in clause 1.1 of the Trust Deed.

⁹ There is currently no applicable law in Queensland. However in Victoria, Tasmania and the ACT same-sex couples can register their relationship.

- Who, although not legally married to the member, lives with the member on a “genuine domestic basis” in a relationship as a couple (de facto spouse).¹⁰

Whether or not a person is a de facto spouse is a matter of fact, not a matter of law. In contrast to the Queensland Succession Act 1981, which 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, there is no minimum time frame under superannuation law for a couple to be considered to be in a de facto relationship.

A person is in a de facto spouse relationship with another person if the persons:

- a) Are not legally married to each other;
- b) Are not related by family; and
- c) Have a relationship as a couple living together on a genuine domestic basis.

The circumstances that may be taken into account in determining 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 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;
- The reputation and public aspects of the relationship.¹¹

2.2 *Child*

A Child of a member includes:

- An adopted child¹², a step-child¹³ 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*.¹⁴

There is no requirement that the child be under age 18. A person remains therefore a child of a deceased Member whatever the child’s age. The only impact in respect of payments to children over the age of 18 is how the benefit is taxed.

2.3 *Person in an Interdependent Relationship with the Member*

A person will also qualify as a *Dependant* if at the time of the member’s death they had an “interdependent relationship” with the member.

Two persons (whether or not related by family) have an interdependent relationship if:

- 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.

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

¹¹ Section 32DA (2) of the Acts Interpretation Act 1954.

¹² An *adopted* child is a person the deceased member adopted in accordance with the relevant State adoption legislation.

¹³ A *step-child* is a person whose natural parent is alive and married to the deceased member at the time of the member’s death.

¹⁴ The *Family Law Act 1975* includes as a child of a relationship children born during the relationship through an artificial procedure.

Two people can be classified as having an interdependent 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.¹⁵

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.¹⁶

2.4 *Dependent on the Member for Maintenance or Support*

Persons who do not fall within the definition of "Spouse", "Child" or a person in an "Interdependency Relationship" may still qualify as a Dependant if at the time of the member's death they are dependent on the deceased member for maintenance or support. This will always be a matter of fact, and the fact of dependency is determined as at the date of death of the person upon whom the claimant was allegedly dependent. 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.¹⁷

2.5 *Where There is no Spouse, Child, Person in an Interdependency Relationship or Person Otherwise Dependent on the Member for Maintenance or Support and no Legal Personal Representative*

Only those persons who fit within the definition of 'Dependant' fall within the class of persons in whose favour the Trustee can consider making a direct payment to. The alternative is to make a payment to the member's *Legal Personal Representative*.

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 any individual who in the Trustee's opinion has a fair claim to the benefit.¹⁸

3 Who Qualifies as a Legal personal Representative

3.1 *Role of the Legal Personal Representative*

The role of a Legal Personal Representative is to collect the real and personal estate of the deceased and administer and distribute the estate.

3.2 *How are the Assets of the Estate Distributed By a Legal Personal Representative*

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* apply. 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

¹⁵ Section 10A of the Superannuation Industry (Supervision) Act 1993.

¹⁶ Regulation 1.04AAAA SIS regulations 1994.

¹⁷ APRA Superannuation Circular No.I.C.2 Paragraphs 13 and 14.

¹⁸ SIS Regulation 6.22(3) and Clause 11.8(e) of the Trust Deed.

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*.

3.3 *Executors and Administrators*

In the case of a member's death, the member's *Legal Personal Representative* includes the member's *Executor* or *Administrator*.¹⁹

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.

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*.

4 Grants of Probate and Letters of Administration

4.1 *Effect of a Grant*

A Grant of Probate or Letters of Administration 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.

4.2 *When is a Grant Necessary*

Where there is a need for a Legal Personal Representative to prove formally their title to any assets, production is necessary.

Whether the Grant is required is a decision for the entity to whom proof is required and in the case of a superannuation death benefit for the trustee

A trustee will be influenced in this regard by the amount of the death benefit and the knowledge that a court will not issue a Grant 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 it is the last valid Will of the deceased.

Where the trustee waives the requirement for production of a Grant the trustee will likely require the Legal Personal Representative to indemnify the trustee. The trustee will be influenced in this regard by the amount of the death benefit, the other assets of the estate, the relationship between the deceased and the Legal Personal Representative and whether there are any persons who were not provided for under the Will or the intestacy provisions who are likely to make a family provision claim.

4.3 *When is a Grant Recommended*

Even when it is possible to deal with all the assets of the estate without obtaining a Grant, a Legal Personal Representative will elect to apply for a Grant to obtain the protection afforded to a Legal Personal Representative with a Grant.²⁰ Under these arrangements the Legal Personal Representative who in good faith and without negligence has sought and obtained a Grant is not liable for any legacy paid or asset distributed in good faith and without negligence in reliance on the Grant notwithstanding any subsequent revocation of the Grant.

4.4 *Grant of Letters of Administration*

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 or persons must apply to the court for a Grant of Letters of Administration to confirm

¹⁹ Definition of Legal Personal Representative in clause 1.2 of the Trust Deed and section 10(1) of the Superannuation Industry (Supervision) Act 1993.

²⁰ Section 53(4) of the *Succession Act 1981*.

their entitlement to administer the estate if that entitlement is required to be proved by a Grant or the person wants the protection afforded by a Grant.

In the case of intestacy, entitlement to the Grant normally follows interest. Usually the spouse is given priority, unless special circumstances warrant it. Where the next of kin of the intestate are entitled to share the estate with the spouse, then they will be next entitled.

4.5 *Grant of Probate*

Where there is a valid Will the executor appointed under a Will must apply to the court for a Grant of Probate to confirm their entitlement under the Will if that entitlement is required to be proved by a Grant or the executor wants the protection afforded by a Grant.

4.6 *Mechanics of Obtaining a Grant*

While there are various forms of Grants 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 the same, additional explanatory affidavits.

4.7 *Costs of Obtaining a Grant*

Naturally, there are costs associated with obtaining a Grant. These include the advertising, service and filing fees and any legal costs in drafting the application and affidavits.

4.8 *Sunsuper Practice*

Sunsuper does not require the production of a Grant in circumstances where the death benefit from the Fund is less than \$50,000. Where the death benefit is more than \$50,000 SunsUPER requires the production of a Grant.

On occasion, SunsUPER will be asked to waive the requirement for a Grant notwithstanding that the death benefit is more than \$50,000. The usual basis of the request is that the cost of obtaining the Grant is not justified having regard to the fact there are no other significant assets of the estate. Where it is considered appropriate and suitable indemnities can be obtained, consideration is given to the request to waive production of a Grant.

5 Summary of the Rules of Intestacy

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

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.

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

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).

Under the *Succession Act*, a defacto 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

²¹for 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). 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.

However the definition of de facto spouse in the *Succession Act* commenced on 1 April 2003, and does not apply to a Will executed before 1 April 2003. If the member's Will was executed before 1 April 2003, the previous definition of defacto spouse²² applies for the purposes of the intestacy rules.

6 Family Provision Claims under the Succession Act

6.1 *Application to Court for Provision*

A deceased person's spouse²³, child, or dependant may apply to the Supreme Court for an order that a provision be made out of the estate of the deceased person for the spouse, child or dependant. An application can be brought whether the deceased dies testate or intestate.

The Court may order that provision be made where:

- In terms of the Will, or as a result of the intestacy, adequate provision is not made from the deceased's estate for the proper maintenance and support of the applicant spouse, child or dependant; and
- The Court is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person prior to the deceased's death, the need of the dependant for the continuance of that maintenance and support, and the circumstances of the case, that it is proper that some provision should be made for the dependant.

The Court has, in the past, considered the following when deciding whether or not to make provision for an applicant:

- The size of the estate;
- Co-operation and support given by the applicant in the conduct of the deceased's business affairs;
- Whether or not the deceased gave the applicant the expectation that property would pass to the applicant on the deceased's death and whether that expectation influenced the way the applicant lived his/her life;
- Whether the applicant has rendered services to the deceased;
- Whether the applicant has a child;
- Whether the applicant has done something to be morally or otherwise undeserving; and
- Whether the applicant has any special needs.

6.2 *Who Can Bring a Claim for Family Provision*

Any spouse, child, or dependant of the deceased can bring a claim for family provision. The *Succession Act 1981* has different definitions 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
- A person who, at the time of the deceased's death, had been living with the deceased

²¹ See Section 5AA of the *Succession Act 1981* and Section 32DA of the *Acts Interpretation Act 1954*.

²² Previously, a defacto spouse was defined as a person who was the opposite sex of the deceased person and who lived in a connubial relationship with the deceased person for a continuous period of at least 5 years ending on the death of the deceased person; or within the period of 6 years ending on the death of the deceased person, has lived in a connubial relationship with the deceased person for periods totalling at least 5 years that include a period ending on the death of the deceased person.

²³ This include same-sex partners and defacto partners under the definitions in the *Succession Act 1981*.

- as a couple on a 'genuine domestic basis'²⁴ 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.

6.3 *When Must the Claim be Brought*

Application must be brought within 9 months of the death of the deceased. The court may direct that an application be heard outside this time limit but the applicant needs to show that he or she was initially not aware of his/her rights and acted promptly once he/she became aware.

6.4 *Relevance of the Trustee's Decision*

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.

The right of a person to bring an application for family provision will only arise therefore in circumstances where the Trustee has made a decision to pay the death benefit or some part thereof to the member's Legal Personal Representative.

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.

6.5 *Impact of a Family Provision Claim*

The Trustee needs to be mindful therefore that in circumstances where there is disagreement between a deceased person's spouse, child and dependents as to the adequacy of the provision made for them then they can make application for family provision to the court. In this case the court will determine whether the Will or the intestacy provisions make adequate provision for the applicant.

6.6 *Interaction with the Superannuation Complaints Tribunal*

The Superannuation Complaints Tribunal cannot deal with a complaint if a proceeding has begun in a court about the subject matter of the complaint and the proceeding has not been finally disposed of.

7 Challenging the Trustee's Decision

7.1 *Which Jurisdiction*

The Trustee's decision in relation to the exercise of its discretion can be challenged in the Supreme Court or the Superannuation Complaints Tribunal.

The common law provides that where:

- A discretion is absolute and unfettered; and

²⁴ "Genuine Domestic Basis" is defined in Section 32DA of the Acts Interpretation Act 1954.

- A trustee exercises the discretion in good faith, upon a real and genuine consideration and in accordance with the purpose for which the discretion was conferred.

The exercise of the discretion will not be examined or reviewed by a court.

This position is further strengthened by the principle that a trustee is not bound to give reasons for its decisions but if a trustee volunteers reasons and those reasons do not justify the conclusions reached by the trustee the court will review the trustee's decision.

The purpose of the Superannuation Complaints Tribunal is to complement, not replace, the court system.

7.2 *Superannuation Complaints Tribunal*

Right to Challenge Trustee's Decision

If the Trustee has made a decision in relation to a deceased member, a person may make a complaint to the Superannuation Complaints Tribunal that the decision was unfair or unreasonable.²⁵

Right to Challenge Restricted in the Case of a Death Benefit

A person may make a complaint to the SCT in the case of a decision that *relates to* the payment of a death benefit "only if":

- The person has "an interest in the benefit";
- The person "claims to be, or to be entitled to benefits through", a person that has an interest in the benefit; or
- The person is acting for a person who has an interest in the benefit or claims to be, or to be entitled to benefits through, a person with an interest in the benefit.²⁶

Subsection 15(2) of the *Superannuation (Resolution of Complaints) Act 1993* sets out a list of four different ways in which a person may acquire an "interest" in the death benefit. This is not an inclusive list. It is an exclusive and exhaustive list.

A person will have acquired an interest in a death benefit only if:

- The person has been given written notice by the Trustee of the proposed payment of the death benefit and has been given written notice by the Trustee of the prescribed period (28 days) within which the person may object and the person has objected within the prescribed period (28 days); or
- The person has not been notified by the Trustee of the proposed payment of the benefit and the failure to notify was unreasonable; or
- The person has been notified by the Trustee of the proposed payment of the benefit but was not notified of the prescribed period to object to the payment; or
- The person has been notified by the Trustee of the proposed payment of the benefit but was notified of a period less than the prescribed period set by the Trustee.²⁷

The notice provisions are often referred to as the "*claim staking procedure*" provisions. They are intended to protect a trustee against having to pay part or all of a death benefit twice. The result is that best practice dictates the Trustee gives written notice to every person who could have an interest in the benefit payable and this is done.

Procedure on Receipt of a Complaint

On receipt of a complaint, the SCT will cause a notice to be given both to the complainant and to the Trustee advising that a complaint has been made.

²⁵ Section 14 of the Superannuation (Resolution of Complaints) Act 1993.

²⁶ Section 15(1)(a) Superannuation (Resolution of Complaints) Act 1993.

²⁷ Section 15(2) of the Superannuation (Resolution of Complaints) Act.

In the first instance the SCT will enquire into the complaint and try to settle it by conciliation.²⁸ Conciliation conferences can be conducted by telephone, closed-circuit television or any other means of communication. 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 the SCT, the SCT must treat the complaint as withdrawn.

If a complaint has not been able to be settled by conciliation the SCT can conduct a review meeting. The review meeting is generally conducted without oral submissions from the parties. At a review meeting, the SCT is not bound by technicalities, legal forms or rules of evidence and is to act as speedily as a proper consideration of the review allows, having regard to the objectives of the SCT and the interests of all members of the Fund.

SCT's Decision Making Powers

In reviewing a decision of the Trustee, the SCT can make a determination in writing:

- Affirming the Trustee's decision;
- Remitting the matter to which the decision relates to the Trustee for reconsideration in accordance with the directions of the SCT;
- Varying the decision; or
- Setting aside the decision and substituting a decision for the decision so set aside.²⁹

The SCT can however only exercise this determination-making power for the purpose of placing the complainant as nearly as practicable in such a position that the unfairness, unreasonableness, or both, that the SCT has determined to exist in relation to the Trustee's decision that is the subject of the complaint no longer exists.³⁰

The SCT must affirm the decision of the Trustee if it is satisfied that the decision, in its operation in relation to the complainant was fair and reasonable in the circumstances.

Guiding Principles

The Guidelines set out in Annexure 2 apply to a death benefit where there is no Binding Nomination (or reversionary pension nomination). Annexure 3 is a Decision Tree reflecting the guidelines. The Guidelines will of course be subject to the provisions of SIS, the Sunsuper Trust Deed and the general law. The Guidelines should be considered in conjunction with the 'Delegation instructions'.

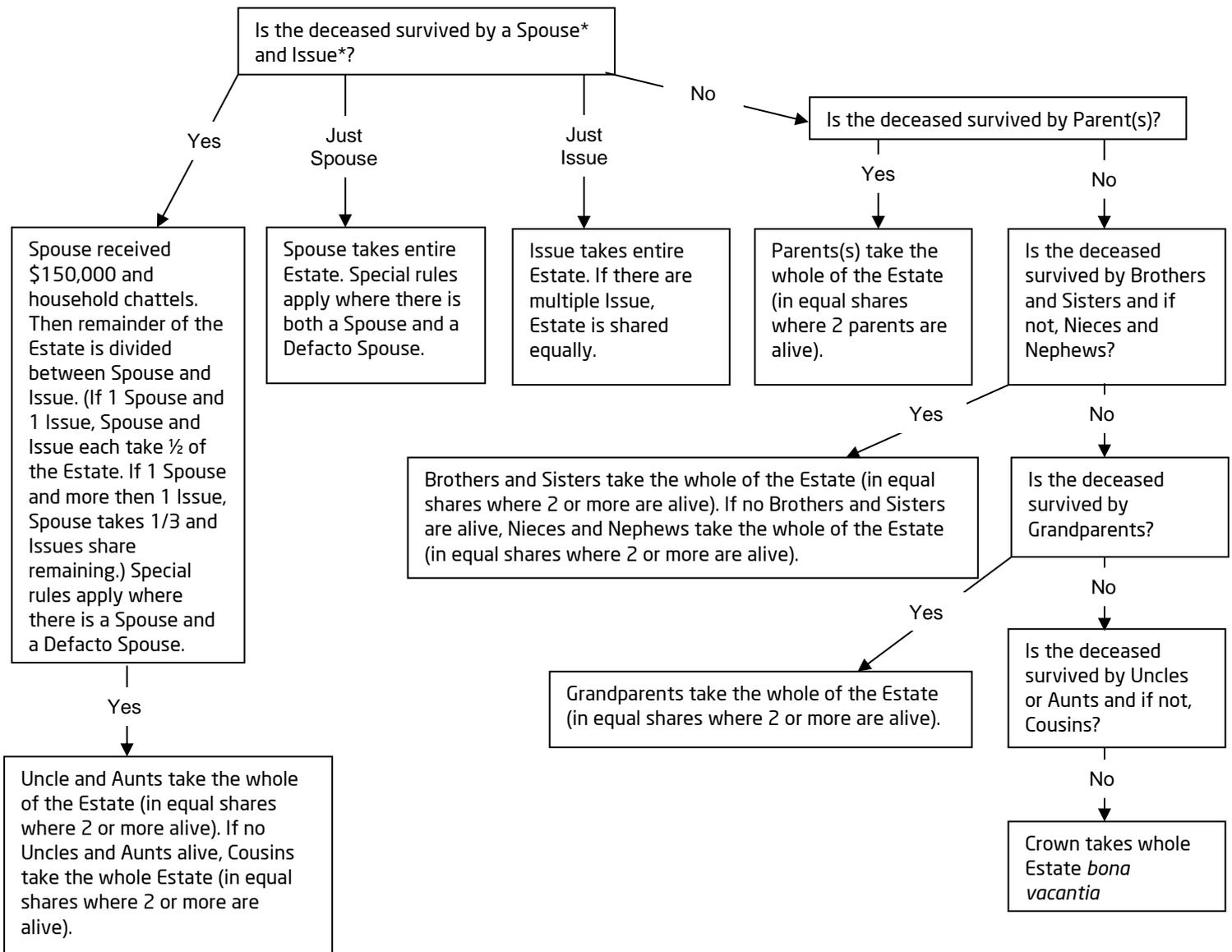
²⁸ Section 27 of the Superannuation (Resolution of Complaints) Act 1993.

²⁹ Section 37(3) of the Superannuation (Resolution of Complaints) Act 1993.

³⁰ Section 37(4) of the Superannuation (Resolution of Complaints) Act 1993.

Annexure 1

Summary of Intestacy Provisions under the *Succession Act 1981*



* "Spouse" includes both a person legally married to the deceased and a defacto 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" The term "issue" includes the deceased's children, grandchildren and all other lineal descendants.

The term "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 its 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 2

In Annexure 2, the terms "Spouse", "Child", "Dependant" and "Legal Personal Representative" have the meanings explained in the section "The Law Relating to Death Benefits".

Clause 1(a) (i): Where there is no current spouse, no known dependants and a Legal Personal Representative is present

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

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

Clause 1(a) (ii): 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; and
- Dependants may fall under the following categories:
 - Children under and over 18 years of ages;
 - Person(s) deemed financially dependent; and
 - Person(s) deemed as being an interdependent.

Clause 1(b): Where the member has made a 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;
- There is no Legal Personal Representative; and
- The total benefit amount exceeds \$50,000.

Clause 1(c): Where a member has made a nomination but there is no current spouse, known dependants or LPR. 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;
- The total benefit amount does not exceed \$50,000.

Clause 1(d): Where a member has made no nomination, 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 provided;

- There is no current spouse;

- There are no known dependants; and
- The total benefit amount exceeds \$50,000.

Clause 1(e): Where a member has made no nomination, 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:

- Next of kin and/or;
- Other person(s) who may have a fair claim to the benefit; and
- The total benefit amount does not exceed \$50,000.

Clause 1(f): Where a member has made no nomination, there is no current spouse, known dependants, Legal Personal Representative or next of kin. 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 the following are not present;

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

Clause 2(a): Where there is a current spouse

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

- (i) The total benefit does not exceed \$25,000 regardless if there are other dependants present; or
- (ii) There are no other known dependants.

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 the level of dependency of the other dependants will be considered when determining distribution in these instances.

