

## EXPLANATORY MEMORANDUM

# Superannuation Wills

A properly drawn estate plan will ensure that upon a person's death, their estate is dealt with in accordance with their wishes and in a tax effective manner. It can also minimise the chances of a successful challenge on their estate. This is usually achieved with a Will that has due regard to what forms part of their estate, and those people to whom they have a legal obligation to make provision for upon their death.

Wills however, have a significant limitation. They can only deal with assets that form part of a person's estate. That is, assets that legally belong to them. Assets they may control, but do not own, will not form part of an estate. This includes assets that are held in family discretionary trusts and superannuation. A proper estate plan will deal with assets that DO NOT form part of an estate.

One of the estate planning strategies that can be used to deal with self-managed superannuation, is a Superannuation Will.

A Superannuation Will provides the Trustee of a self-managed Superannuation Fund with written instructions that must be followed in the event of the death of a member of the Fund. Such instructions may include, but are not limited to:

1. the provision of superannuation death benefits to someone nominated by the member;
2. the nomination of a person as a replacement Trustee of the Fund following the death of the last trustee; and/or
3. the designation of a particular superannuation asset from which a specific death benefit is to be paid from.

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### SUPERANNUATION ESTATE PLANNING OPTIONS

Currently the law allows members of a self-managed Superannuation Fund to provide for their dependants (or other persons) in the following ways:

1. The Trustee may make a lump sum payment from the Fund to a dependant of the deceased member or to the legal personal representative of the member's estate. The payment of any benefit may be made by transferring an asset to the beneficiary personally. This can only be done in accordance with a Superannuation Will.
2. The Trustee may pay a pension from the Fund to a tax dependant of the deceased member. Any such pension must cease by the time the tax dependant reaches 25 years of age. Where a Superannuation Will is in existence, the pension may be paid out of either the member's pension or from accumulated benefits.
3. The member may have a pension which has a reversionary interest. Upon the death of the member the pension they were receiving will continue to be paid to the reversionary beneficiary as nominated by the member in their Superannuation Will.

The following outlines the value of having a Superannuation Will as well as the various directions which a member can make in respect of their superannuation.

As the proceeds in a Superannuation Fund do not form part of a person's estate, they will only be subject to the terms of a Will if the Trustee of the Superannuation Fund pays the member's Superannuation proceeds to their legal personal representative. The Trustee of the Superannuation Fund will (most likely) pay the member's superannuation proceeds to their legal personal representative unless the member has effectively directed the trustee **not to** do so. The **sole purpose** of a Superannuation Will is to give direction to the Trustee of a Superannuation Fund. By ensuring a Superannuation Will is part of the **governing rules of the Fund**, the Trustee **must** follow the member's directions. The directions given to the Trustee should be based on good estate planning principles to achieve the member's desired outcome. That is, to get the member's entitlements to its nominated beneficiaries in a tax effective manner.

For the reasons stated above it is advantageous for a member to have their death benefits paid directly in accordance with their instructions, rather than having the death benefits paid to their legal representative and form part of their estate. This could see the death benefits be used to pay the debts of the estate, or be attacked by anyone claiming against the estate. This is the inherent value in a Superannuation Will.

### **Non-Binding Death Benefit Nomination**

Through a non-binding death benefit nomination, a member may provide the Trustee with written nominations as to how they wish some or all of their death benefits are to be distributed. Such nominations serve as a guide only as they are **not binding** on the Trustee of their Superannuation Fund. The Trustee will however, take the nominations into consideration in deciding to whom the member's death benefits are paid.

### **Non-Lapsing Binding Death Benefit Nomination**

Binding death benefit nominations provide the greatest certainty as to who benefits from a member's superannuation following their death. A Superannuation Will (being a form of a Binding Death Benefit Nomination) allows a member to direct the Trustee of their Superannuation Fund as to how their death benefits are to be distributed. Furthermore, a member can direct the Trustee as to who they wish to have replace them as Trustee of the Superannuation Fund.

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## **TAXATION OF DEATH BENEFITS**

The taxation of superannuation proceeds is complex and the regulations affecting it are often changed.

When creating a Superannuation Will, it is important that each member is advised on and consider the tax-free, taxable and untaxed components of any pension or any other amount payable on their death.