

EXPLANATORY GUIDE FOR BINDING DEATH BENEFIT NOMINATIONS

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The PantherCorp CST/MJHC Legal BDBN Package

PantherCorp CST in conjunction with MJHC Legal has developed a standard BDBN package which will meet the requirements of most Fund Members. It is a non-lapsing death benefit nomination that deals with:-

- payment of BDBN to surviving spouse
- reflects a requirement that any member pension is paid to the surviving spouse (thus becoming an auto-reversionary pension)
- if no surviving spouse, then death benefit is paid to the member's estate although there is the ability to pay a death benefit to other eligible dependants before distributing to the estate.

Complex or more sophisticated BDBNs are also available. The complex BDBN contemplates the ability to nominate specific individual assets to members and to cater for conditional binding death benefit nomination.

Standard binding death benefit nomination can be ordered for a fee of \$250.00 plus GST. The fee for complex binding death benefit nomination is subject to the specific requirements of the Fund Member's instructions. Fund members should allow \$440.00 plus GST for a complex BDBN. An additional fee may apply if the Fund is not using the PantherCorp CST Superfund Rules and the BDBN requires customisation to meet the requirements of the Fund's specific rules.

To provide this BDBN package at this competitive rate, it is a requirement that Fund Members or their advisors complete a BDBN Instruction Sheet.

What you get in the Package

When ordering a BDBN package, the instructions and package are reviewed by MJHC Legal to ensure SISA compliance. The Fund and Fund Member receive the following documents:-

1. Instructions on signing documents in the package
2. Trustee Minutes accepting the nomination
3. Binding Death Benefit Nomination
4. Explanatory Notes

Who can receive the Death Benefit?

Death benefits are permitted only to be paid to a limited class of beneficiaries as specified by SISA. Generally, this means a death benefit can only be paid to one or more of a Member's dependants and/or their legal personal representative (LPR) to be distributed in accordance with the terms of their Will or the laws of intestacy (if the member does not have a Will).

For SISA purposes, a person's dependants include their spouse and children, any person with whom they have an independency relationship and any person who is financially dependant on them. Spouse includes domestic and same sex partners and children include adopted children, ex-nuptial children and children of the person's spouse. Two persons are in an interdependency relationship if they have a close personal relationship and they live together and one or each of them provides the other with financial and domestic supported personal care.

Since 1 July 2007, there have been further restrictions on the persons to whom a trustee can pay a death benefit in the form of a pension. Only a person who is a dependant of the deceased is able to receive a death benefit pension. Benefits paid to non-dependants must be in the form of a lump sum. Children under the age of 18 years of age are treated as dependants. Children must otherwise be less than 25 years of age and financially dependant or have a prescribed form of disability.

Why consider a BDBN?

A BDBN provides certainty about who is to receive a Member's death benefit. The Member gets to make that decision which is removed from the hands of the Fund Trustee.

A BDBN is also a useful tool for ensuring that a Member's pension is treated as an auto-reversionary pension under taxation law. It is highly desirable, however, that there is consistency between a Member's pension paperwork and a BDBN.

However, people's circumstances and requirements are not always the same and Members should obtain advice from their advisers about what is appropriate for them.

What Fund Rules should the Fund be using?

The Binding Death Benefit Nomination ('BDBN') package to be prepared for Fund Members requiring BDBNs is best used in conjunction with the PantherCorp CST Superfund Rules Version 7.0 or later. To accept a Non-Lapsing BDBN, a Fund must be using Version 3.0 (applying from 13 May 2006) or later. To accept any BDBN (but which must comply with SISA requirements as to form and content, a Fund must be using Fund Rules Version 2.03 (applying from 17 May 2005) or later. A Fund is unable to accept a BDBN if the Fund was amended or established prior to 17 May 2005 and must upgrade its Fund Rules.

What's covered in the PantherCorp CST Superfund Rules about death benefits?

The PantherCorp CST Superfund Rules Version 7.0 provides considerable flexibility as to the form and content of what is intended by a Fund Member to be a BDBN or a non-binding DBN. This Guide, however, has an emphasis on the BDBN.

Rule 5.6 of the PantherCorp CST Superfund Rules Version 7.0 specifically deals with Death Benefit Nomination. Rule 5.6 is intended to deal with and/or minimise some of the issues and arguments that have arisen in court decisions dealing with death benefits. Rule 5.6 does not require any express formal requirements or particular language and words so long as it is clear that the nomination is intended to be binding upon Fund Trustees.

Under Rule 5.6, a BDBN does not have to lapse after 3 years but can operate indefinitely until it is revoked. Also, it does not have to be witnessed to be a BDBN. Having regard to recent court cases dealing with death benefits and death benefit nominations, Rule 5.6 covers the following scenarios:-

- The BDBN does not have to be given to the fund trustees before the member's death. It is only a requirement that the member executed a BDBN prior to the member's death. This covers the scenarios where a member does not want the other trustees/trustee directors to be aware of the contents of the BDBN (e.g. co-trustee is spouse from second marriage but the death benefit is to be paid to the children of first marriage).
- The BDBN does not have to expressly state that it is a BDBN. The Fund Trustees merely need to be satisfied that the language expresses an intention on the part of the Member that it be a binding nomination.
- There is no formality in terms of content or execution which must be followed in order for it to be a BDBN.

Some formality is important

Rule 5.6 provides protection for the Member who prepares a death benefit nomination without giving too much thought to the legal niceties associated with preparing a document as important as a death benefit nomination but does want it to be binding. The PantherCorp CST Superfund Rule is to some extent designed to protect Members from themselves.

Despite the flexibility afforded by Rule 5.6 of the PantherCorp CST Superfund Rules, to reduce the potential for future disputes it is preferable as provided for in the PantherCorp CST BDBN package that BDBNs:-

- are signed and dated by the Fund Member and witnessed by at least one independent witness;
- the nomination does include a clear statement that it is to be binding on Fund Trustee;
- a signed, witnessed and dated copy of the BDBN be given to all Trustees/Trustee directors.

Additional Protections Provided by the PantherCorp CST Superfund Rules

It is important to also note that PantherCorp CST Superfund Rules Version 7.0 provides additional protections for Fund Members in relation to death benefits. To better protect the interests of Members and their beneficiaries the Version 7.0 Superfund Rules provide that:-

- if there is no BDBN in place, the continuing trustees/trustee directors cannot make a decision concerning death benefits of a deceased member unless and until an LPR of the deceased member is appointed as a trustee/trustee director.
- there is a restriction on removing an LPR trustee until the death benefit has been paid.

Tricky Future Legal Issues

There are now a growing number of legal decisions dealing with death benefits issues following the death of a SMSF fund members. These cases have dealt with disputes and arguments about who and when a replacement trustee can be appointment following the death of a fund member, the payment of death benefits when there is a non-binding death benefit nomination and also arguments about whether a death benefit nomination was a BDBN or not.

Death benefit nominations are becoming a ripe area for argument. Even where a BDBN is in place, there is potential for family members (out of financial self interest) to challenge whether a BDBN intended to be binding is in fact binding because it does not follow some technical formality required by SISA or fund rules.

Neither the PantherCorp CST Superfund Rules nor a BDBN is an answer to all possible concerns and problems because everyone's circumstances are different. Fund trustees and Fund Members should obtain specific advice about their particular circumstances and the manner in which Death Benefit Nominations, executor's appointments and enduring attorney appointments impact on their interests in their SMSF.