

NON-LAPSING BINDING DEATH BENEFIT NOMINATION

The De Marco Superannuation Fund

Nickolas De Marco

Level 23 Central Plaza One
345 Queen Street
BRISBANE QLD 4000
Tel: (07) 3231 0600
Fax: (07) 3221 2921
Our ref: NJD:TNH:NIC:110556

www.mcw.com.au

Brisbane
Maroochydore
Southport

Affiliated office
Sydney

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General Information

1. IMPORTANT INFORMATION

A member may nominate a beneficiary (or beneficiaries) to receive his/her superannuation benefit in the event of the member's death. Provided the nomination remains valid, in accordance with the law, it is binding on the trustee as if it were terms of the superannuation fund trust deed.

2. PAYMENT OF DEATH BENEFITS

The payment of death benefits from a superannuation fund is determined in accordance with the governing rules of the superannuation fund and not in accordance with the terms of the deceased member's will.

Trustees of a Self Managed Superannuation Fund (**SMSF**) cannot abrogate their responsibility in making decisions in the exercise of their fiduciary functions except as authorised under the governing rules of the fund or legislation. When undertaking their duties, trustees must act in good faith, responsibly and reasonably.

The payment of death benefits from a superannuation fund is therefore ultimately a matter for the discretion of the trustee of the fund unless legislation or the governing rules provide otherwise.

3. LEGISLATION

Section 55A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**), which applies to 2007/08 and later income years, provides that the governing rules of a regulated superannuation fund must not permit a fund member's benefits to be cashed after the member's death otherwise than in accordance with the operating standards. The governing rules of a fund are invalid to the extent that they are inconsistent with this provision of the *SIS Act*.

The *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**Regulations**) specify the range of persons in whose favour the death benefits of a member of a regulated superannuation fund may be cashed. Death benefits may, subject to certain limited exceptions, only be paid to a member's legal personal representative or one or more of the member's dependants.

The *Regulations* do allow death benefits to be cashed in favour of another individual if, after making reasonable enquiries, the trustee of the fund is not able to find either a legal personal representative or a dependant of the member.

Subsection 59(1) of the *SIS Act* provides a prohibition against the governing rules of a superannuation fund permitting discretion to be exercised by a person other than the trustee, but the prohibition does not apply to SMSF's.

4. SMSF'S AND DEATH BENEFIT NOMINATIONS

The Australian Taxation Office has advised in SMSFD 2008/3 that section 59 of the *SIS Act* and regulation 6.17A of the *Regulations* do not apply to SMSF's.

This means that the governing rules of a SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A (which relate to 'lapsing' binding death benefit nominations).

Subsection 55A(2) of the *SIS Act* provides that a death benefit nomination is not binding on the trustee to the extent that it nominates a person who cannot receive a benefit in accordance with the operating standards set out in the *Regulations*.

The operating standards in the *SIS Act* and *Regulations* limit the range of persons in favour of whom member benefits can be cashed after the death of the member. Subject to limited exceptions specified in the *Regulations*, member death benefits must be cashed in favour of a member's legal personal representative and/or one or more of the member's dependants.

With effect from 1 July 2007, the *Regulations* further restrict the persons to whom the trustee can pay a death benefit in the form of a pension. A death benefit in the form of a pension may be paid only to a person who is a dependant of the deceased member, and in the case of a child of the deceased member is:

- (a) less than 18 years of age; or
- (b) being 18 or more years of age is:
 - (i) financially dependent on the member and less than 25 years of age; or
 - (ii) has a disability of a kind prescribed.

Prior to the inclusion of section 55A, which became effective from 1 July 2007, a death benefit nomination that purported to direct a trustee to pay death benefits otherwise than as permitted under the operating standards that then existed would still not have been binding on the trustee even if made in accordance with the governing rules.

5. RESTRICTIONS OF WHO CAN RECEIVE A DEATH BENEFIT

As mentioned above, there are certain restrictions as to who can receive a death benefit.

5.1 Legal personal representative

'Legal personal representative' is defined in the *SIS Act* as 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person'.

5.2 Dependant

'Dependant' is defined in the *SIS Act* to include 'the spouse of the person, any child of the person and any person with whom the person has an 'interdependency relationship'.

A 'dependant' for the purposes of the *SIS Act* includes a person who is a dependant under the ordinary meaning of the word in the context in which it is used as the definition is inclusive.

Accordingly, 'spouse' includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person (ie a defacto spouse).

'Child' includes an adopted child, step-child, ex-nuptial child or adult child of the deceased person.

Most grandchildren are not eligible to receive death benefits from their grandparent's superannuation death benefits. Accordingly, if you choose to make a nomination to grandchildren in this non-lapsing binding death benefit nomination then it may be at risk of being considered to be outside the parameters of the *SIS Act* and *Regulations* and therefore invalid.

5.3 Interdependency relationship

Two persons have an 'interdependency relationship' under the *SIS Act* if they have a close personal relationship and either:

- (a) they live together, and one or each of them provides the other with financial support, domestic support and personal care; or
- (b) the reason they do not satisfy the requirements in (a) is that either or both of them suffer from a physical, intellectual, psychiatric or other disability, or they are temporarily living apart (for example due to a gaol term).

The *Regulations* provide that all of the circumstances of a relationship are relevant to determining if an 'interdependency relationship' exists including several factors listed in the *Regulations*.

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Nomination form

1. GENERAL INFORMATION

Fund Name: The De Marco Superannuation Fund

Pursuant to clause 43.2 of the trust deed for The De Marco Superannuation Fund (**Fund**) a member may provide the trustee with a notice in writing requesting that the trustee establish a non-lapsing binding death benefit nomination that requires the trustee to pay benefits in the event of the death of the member in a manner and form that the member so chooses.

Accordingly, I wish to establish a non-lapsing binding death benefit nomination that requires the trustees to pay benefits in the event of my death in the manner set out in this nomination form.

This non-lapsing binding death benefit nomination replaces any previous non-lapsing binding death benefit nominations or lapsing binding death benefit nominations that I may have previously made.

2. MEMBER'S DECLARATION

I, Nickolas De Marco (**Member**), direct the trustees of the Fund to apply the proceeds of any death benefit payable in respect of my member account and any other benefits payable on my death to the persons nominated in this form, provided this nomination form is valid and has been made in accordance with the rules of the Fund. For the avoidance of doubt, I revoke any nomination made by me prior to the date of this nomination.

3. NOMINATION DETAILS

If my wife, Olga De Marco, fails to survive me, I direct the trustee of the Fund to apply the proceeds of any death benefit as follows

Beneficiary	
Name	Legal Personal Representative of my Estate
Proportion of deceased primary beneficiary's share	100%
Type of distribution (subject to restrictions summarised above)	Lump sum

4. MEMBER DECLARATION AND SIGNATURE

I request that the trustees establish a non-lapsing binding death benefit nomination.

I understand that:

- (a) On my death, the trustees must pay my death benefit in accordance with this nomination, provided it is valid, at that time.
- (b) I can amend or revoke the non-lapsing binding death benefit nomination at any time, by providing a new binding death benefit nomination to the trustees that is signed and dated by me.
- (c) Unless this non-lapsing binding death benefit nomination is amended or revoked, it is binding on the trustees for an indefinite period.
- (d) If the non-lapsing binding death benefit nomination is invalid at the time of my death, the trustees have the discretion to determine the beneficiaries. To the extent the non-lapsing binding death benefit nomination is partly not valid at the time of my death, such as where one nominated beneficiary is no longer a 'dependant', the trustees will pay that component of the death benefit to any remaining nominated beneficiaries in the same proportions as their component of the death benefit which is valid shall bear to one another.

5. ACKNOWLEDGEMENT

I have not received any legal or financial advice in relation to the validity of this non-lapsing binding death benefit nomination from McInnes Wilson Lawyers.



Signature of Member

NICKOLAS DE MARCO

Full Name of Member

23-5-2016

Date

6. DECLARATION AND DETAILS OF WITNESS

We declare that this binding nomination form was signed in our presence, that we are each over the age of 18 years, and are not nominated in this notice.

Witness 1

Signature of Witness 1

BARBARA LINCOLN

Full Name (BLOCK LETTERS)

CHERK

Occupation

37 ARAUEN ST, KEDRON, 4031

Address

23-5-2016

Date

Witness 2

Signature of Witness 2

RANDU COUES

Full Name (BLOCK LETTERS)

CHARTERS RELOWERS

Occupation

36 ROSELEIGH ST WOOLWIND 24030

Address

23-5-2016

Date

7. ACKNOWLEDGEMENT AND ACCEPTANCE BY TRUSTEES

The trustees acknowledge and accept this binding nomination made by **NICKOLAS DE MARCO**

SIGNED by **NICKOLAS DE MARCO**, in
the presence of:



Signature of witness

RANDY LOWESS

Name of witness (BLOCK LETTERS)



Signature of party

23-5-2016

Date signed

SIGNED by **OLGA DE MARCO**, in the
presence of:



Signature of witness

RANDY LOWESS

Name of witness (BLOCK LETTERS)



Signature of party

23-5-2016

Date signed