

An Empirical Study of the Distribution of Superannuation Death Benefits

Tobias Barkley* and Xia Li†

Abstract

In Australia, if a superannuation member dies before retirement, they will leave superannuation death benefits that must be distributed. Death benefits are usually distributed at the discretion of the trustee or, on appeal, by the Australian Financial Complaints Authority ('AFCA'). Analysis of the distribution of death benefits is exceedingly scarce in the literature. There is some practitioner commentary and case law, but it is not consistent on how this discretion is, or should be, exercised. General trust law holds that trustees exercise broad discretions and have duties to consider all relevant matters, including any non-binding nomination of beneficiaries by the deceased. Other evidence suggests that AFCA does not follow this approach. This article undertakes the first empirical examination of the distribution of death benefits by AFCA. Key findings are (1) there is no evidence that the deceased's wishes expressed in non-binding nominations have any association with distribution outcomes; and (2) there is a very strong association between receiving a distribution and AFCA's view that someone was financially dependent on the deceased.

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* Lecturer, La Trobe Law School, La Trobe University, Melbourne, Victoria, Australia. Email: t.barkley@latrobe.edu.au; ORCID iD: <https://orcid.org/0000-0003-4029-4464>.

† University Statistics Consultant, Department of Mathematics and Statistics, La Trobe University, Melbourne, Victoria, Australia. ORCID iD: <https://orcid.org/0000-0003-1890-5548>.

I Introduction

Australia's system of compulsory superannuation means that most people in Australia have a superannuation account. It also means that most people,¹ many unwittingly, are subject to the obscure system that governs the distribution of their accumulated superannuation benefits in the event they die before retirement. If a superannuation fund member dies before they reach retirement, their superannuation benefits do not pass under their will or to their estate.² This is because superannuation benefits are not the absolute property of superannuation fund members. Members only have contingent interests in their benefits,³ which means they are only entitled to demand them in certain conditions. The primary condition for release of benefits is surviving until retirement or 65 years of age.⁴ Approximately 27,000 people die each year between the ages of 20 and 65, which is approximately 20% of total deaths.⁵ Most of these people are likely to have an accumulation superannuation account, and often a life insurance policy bundled with that account, which will be distributed as 'death benefits'. Therefore, the way these death benefits are distributed is important to all Australians.

The distribution of death benefits can be controlled by superannuation fund members directly through the creation of a binding nomination of beneficiaries.⁶ However, what usually happens is that the benefits are distributed through an exercise of discretion by the trustee of the superannuation fund, due to the absence of a binding nomination.⁷ The discretions written into most superannuation trust deeds enable the trustees to choose who receives the death benefits, although legislation requires that the deceased member's dependants and legal personal representative benefit before anyone else. In addition to allowing binding nominations, superannuation trustees often allow members to complete non-binding nominations that express their wishes about how they would like their death benefits to be distributed. Except where the trustee's discretion is removed by a binding nomination,⁸ the terms of trust deeds and the legislation grant superannuation trustees very broad discretions. The important question for those of us with superannuation accounts is how trustees exercise their broad discretions.

¹ Over 92% of superannuation accounts are in regulated funds that are governed by the rules discussed in this article: Australian Prudential Regulation Authority, *Annual Superannuation Bulletin: June 2015 to June 2023* (Bulletin, 31 January 2024) <<https://www.apra.gov.au/annual-superannuation-bulletin>>.

² *Stock v NM Superannuation Pty Ltd* [2015] FCA 612, [16] (Tracey J).

³ See *Latorre v Maddock* (2012) 47 Fam LR 206, 210 [12] (Jarrett FM).

⁴ *Superannuation Industry (Supervision) Act 1993* (Cth) s 62 ('SIS Act'); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01, sch 1 ('SIS Regulations'). Other conditions for release of funds include terminal medical conditions, permanent incapacity, severe financial hardship, emigration of temporary residents and compassionate grounds.

⁵ See Australian Bureau of Statistics, *Deaths, Australia, 2021* (Catalogue No 3302.0, 29 September 2022); Australian Bureau of Statistics, *Deaths, Australia, 2020* (Catalogue No 3302.0, 29 September 2021); Australian Bureau of Statistics, *Deaths, Australia, 2019* (Catalogue No 3302.0, 24 September 2020).

⁶ The legislation does not require every superannuation fund to offer binding nominations, but most funds do.

⁷ See below Part III.

⁸ The trustee's discretion is also de facto removed where there is only one dependant or legal personal representative, which the trustee is obliged to prioritise before others.

There is a conflict in the commentary and case law about how trustees do, and should, exercise these discretions. The general trust law approach to these types of discretion is that the trustee should consider all relevant matters⁹ and tailor the decision to the particular circumstances of the case.¹⁰ However, there is another approach that suggests trustees apply rules, or presumptive preferences, to determine outcomes.¹¹ Particularly, there is a perception that trustees generally distribute death benefits to those who were financially dependent on the deceased immediately before their death.¹² This raises the question of the extent to which the deceased's wishes are taken into account.

This article undertakes an empirical investigation of the practice of death benefit distribution. It investigates the practice by focusing on the decision outcomes rather than what is being said about the process of decision-making. Broadly, this study asks whether the evidence is more consistent with a flexible discretion that takes into account a full range of relevant circumstances and complexities arising from a particular deceased member's death or more consistent with a narrow discretion that applies a rule or presumptive preference. The study focuses on associations between distribution outcomes and variables including financial dependence on the deceased and nomination as preferred beneficiary by the deceased. It also investigates whether the recent decision of *Wan v BT Funds Management* has changed the practice.¹³

The evidence examined by the study is the reported cases of the Australian Financial Complaints Authority Ltd ('AFCA'). AFCA operates an external dispute resolution scheme for trustee decisions on death benefit distribution and is the successor to the Superannuation Complaints Tribunal ('SCT'). AFCA cases have been chosen as the object of study because they are published publicly, whereas trustees' decisions are not. AFCA's cases are highly relevant to understanding how superannuation trustees are likely to exercise their discretions because AFCA is the primary arbiter of disputes about death benefits. While AFCA cases on what constitutes fair and reasonable distributions are not technically binding on trustees,¹⁴ trustees that want to avoid having decisions reversed will pay attention to them.

As will be seen, the main conclusion of the study is that AFCA cases are more consistent with a narrow discretion than a broad discretion. Over 90% of distribution decisions are consistent with a presumptive preference in favour of financial dependants. In contrast, the study finds no statistically significant evidence that AFCA places weight on the deceased's non-binding wishes. In addition, there is no evidence that AFCA's practice has changed since *Wan*. This suggests that AFCA continues to apply a narrow discretion dominated by presumptive preferences and

⁹ *Pitt v Holt* [2013] 2 AC 108 ('Pitt').

¹⁰ *Wan v BT Funds Management Ltd* (2022) 160 ACSR 81, 107 [112] (Anastassiou J) ('Wan').

¹¹ Stanley Drummond and Christopher Allen, 'Superannuation Death Benefit: No Presumptive Preference in Favour of Dependents — "Wan v BT Funds Management"' (2022) 33(7–8) *Australian Superannuation Law Bulletin* 101, 104.

¹² Pam McAlister and Lynda Purcell, 'Claiming Discretionary Superannuation Death Benefits: A Warning about Conflicts of Interest!' (2014) 30(8) *Australian Banking & Finance Law Bulletin* 168, 169.

¹³ *Wan* (n 10).

¹⁴ See below text accompanying nn 38–41.

inconsistent with the broad discretion found in general trust law. A key implication is that it is misleading to offer non-binding nominations without explaining to members that they are likely to be given very little weight.

The next Part sets out the legal framework that governs the distribution of death benefits in regulated superannuation funds. This framework delineates the scope of the trustees' discretions over that distribution and AFCA's discretion when resolving complaints. Part III summarises the conflicting doctrinal approaches that have been suggested about how superannuation trustees and AFCA exercise, or should exercise, their discretions. Part IV describes the empirical methodology adopted in this study and Part V sets out the results. Part VI examines the results to assess what they tell us about how AFCA distributes death benefits.

II Legal Framework

The distribution of death benefits is regulated within a complex legal framework.¹⁵ The framework is found in statutes, regulations, superannuation trust deeds, court cases and AFCA operating rules. The framework performs two functions: (1) it orders potential beneficiaries within a hierarchy of priorities; and (2) it grants a discretion to trustees to choose how to distribute death benefits between potential beneficiaries at the same level in the hierarchy.

A Hierarchy of Beneficiary Priority

The *Superannuation Industry (Supervision) Act 1993* (Cth) and its regulations create a hierarchy of different types of beneficiary. The hierarchy involves the key categories 'dependant' and 'legal personal representative'. The regulations provide that if anyone fitting these categories can be reasonably found then no death benefits can be paid to anyone else.¹⁶ The statutory definition of 'dependant' includes the spouse and any child.¹⁷ 'Spouse' includes member of a same-sex married¹⁸ or de facto¹⁹ couple. 'Child' includes an adopted, exnuptial or stepchild, and any child of the deceased's spouse.²⁰ This is surprisingly expansive as it includes any stepchild of the deceased's spouse.²¹ The statutory definition is inclusive so does not limit the ordinary meaning of dependant, which includes financial dependants who are neither children nor spouses.²² There is conflicting case law on whether the ordinary meaning extends beyond financial dependence to emotional or other forms of

¹⁵ This is limited to regulated funds, which are regulated by the Australian Prudential Regulation Authority. Self-managed superannuation funds are not subject to the same governance mechanisms.

¹⁶ *SIS Regulations* (n 4) reg 6.22.

¹⁷ *SIS Act* (n 4) s 10(1) (definition of 'dependant').

¹⁸ *Ibid* s 10(1) (definition of 'spouse' para (a)).

¹⁹ De facto means living together 'on a genuine domestic basis in a relationship as a couple': *ibid* s 10(1) (definition of 'spouse' para (b)).

²⁰ *Ibid* s 10(1) (definition of 'child').

²¹ The Superannuation Complaints Tribunal held that stepchild means a child of the deceased's spouse and that the stepchild relationship may continue after the death of the spouse: *D19-20/023* [2019] SCTA 149. See also *Scott-Mackenzie v Bail* (2017) 16 ASTLR 449.

²² See *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83.

dependence.²³ ‘Legal personal representative’ (‘LPR’) means the executor of the will or administrator of the deceased’s estate.²⁴

While dependants and LPRs always have priority over others, there can be additional hierarchies within those priority categories. Legislation provides a pathway by which members can create a binding nomination that, if valid, removes any discretion from the trustee.²⁵ Only dependants and LPRs can be validly nominated, considerable formalities must be complied with, and the binding nomination lapses after three years.²⁶ In addition, many trust deeds provide a second pathway for ‘non-lapsing’ binding nominations,²⁷ which is permitted by the statute provided the trustee consents to the nomination.²⁸ This study refers to nominations as binding if they effectively remove the trustee’s discretion and oblige the trustee to give effect to the member’s wishes expressed in that nomination. It is also possible for trust deeds to create different levels of hierarchy within the categories of dependant and LPR. For example, where there is no nomination (binding or non-binding), the BT Lifetime Super deed obliges the trustee to pay death benefits to the LPR ahead of dependants.²⁹

The effect of the hierarchy on the trustee is to define the scope of the superannuation trustee’s discretion. Thus, the first questions a trustee must decide are who, if anyone, is a dependant or LPR, and whether any binding nomination is valid. These questions of scope can be very difficult due to complex and uncertain factual evidence. However, answering them is not an exercise of discretion because there are objectively correct answers.³⁰ In summary, the hierarchy of priority is (1) dependants and LPRs nominated in a valid binding nomination; (2) dependants and LPRs not so nominated; and (3) others. Where someone from a higher priority group can be found, no one in a lower priority group will receive anything.

B Trustee Discretions

Within the scope of the hierarchy of priority, discretions are granted to trustees to decide how the death benefit should be distributed among the eligible recipients. These discretions are found in the trust deeds rather than legislation. For example, a typical clause is that in the Hostplus Deed:

²³ Ibid [18]–[19]. Cf *Wan* (n 10) 110–15 [127]–[152] (Anastassiou J).

²⁴ *SIS Act* (n 4) s 10(1) (definition of ‘legal personal representative’).

²⁵ Ibid s 59(1A). Superannuation trusts must include this pathway in the trust deed for it to be available.

²⁶ *SIS Regulations* (n 4) reg 6.17A.

²⁷ See Luke Hooper, ‘When Consent to a Non-Lapsing Nomination Is Revoked’ (2017) 29(4) *Australian Superannuation Law Bulletin* 69.

²⁸ *Retail Employees Superannuation Pty Ltd v Pain* (2016) 139 SASR 401, 492–3 [493] (Blue J). Trust deeds may provide that the trustee’s consent is withdrawn on the occurrence of certain events such as divorce of the member, rendering the non-lapsing nomination non-binding: *Re BT Funds Management Ltd* [2017] NSWSC 45.

²⁹ BT Lifetime Super, ‘Trust Deed’ (5 January 2015) cl 6.9B(c) <<https://www.bt.com.au/about-bt/bt-financial-group/additional-disclosure/bt-funds-management-limited.html>>.

³⁰ See *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270 [29]–[30] (French CJ, Gummow, Heydon, Crennan and Bell JJ) (‘*Finch*’).

Subject to the Relevant Law, upon the death of a Member or Beneficiary, the Trustee will:

(i) ... [follow any binding nomination]

and otherwise:

(ii) where the Member or Beneficiary had Dependants: pay or apply the Benefit to one or more of the Member's or Beneficiary's Dependants (including any Nominated Beneficiaries) and Legal Personal Representative in such proportions, form, manner and at such times as the Trustee in its discretion determines, provided that the payment of the Benefit complies with the Relevant Law; or

(iii) where the Member or Beneficiary had no Dependants: pay the Benefit to the Legal Personal Representative of the Member or Beneficiary, or if there is no Legal Personal Representative may pay or apply the Benefit in such a manner as permitted by the Relevant Law.³¹

This grants trustees two distinct discretions. One is to choose between dependants or LPRs, where they are present without a binding nomination. The other is, where there are no dependants or LPRs, to choose between all others.

This trust deed is typical in providing no guidance to the trustee on how it is to exercise the discretion.³² The legislative framework does not supply any guidance either.³³ However, it does set out the AFCA complaints framework.

C AFCA's Jurisdiction

AFCA's jurisdiction over trustee decisions is to review whether they are 'fair and reasonable in all the circumstances'.³⁴ If AFCA is satisfied that the trustee's decision was unfair or unreasonable, AFCA will exercise the discretion to remedy the fault.³⁵ This allows review of the merits of the trustee's decision rather than the process of decision-making.³⁶ That is, AFCA may find a decision outcome was fair and reasonable even if the trustee's process was irrational. Unlike the binary structure of many legal disputes, the review always involves multiple parties: legislation obliges the trustee to notify all other people who may have an interest in the death benefit so they can be joined if they choose.³⁷

The peculiarities of AFCA's jurisdiction must be understood in light of the *Australian Constitution*. The courts have interpreted the *Constitution* to reserve all 'judicial power' to courts and prevent it being exercised by tribunals.³⁸ However, the courts also recognise the practicality and convenience of tribunals. This leads the

³¹ Hostplus Superannuation Fund, 'Trust Deed' (1 September 2023) cl 13.13(c) <<https://hostplus.com.au/about-us/company-overview/governance-and-disclosures>>.

³² The distribution allocation between those nominated in a binding nomination will be determined by that nomination.

³³ *Brine v Carter* [2015] SASC 205, [72] (Blue J).

³⁴ *Corporations Act 2001* (Cth) s 1055(3) ('*Corporations Act*').

³⁵ *Ibid* s 1055(5).

³⁶ *Lykogiannis v Retail Employees Superannuation Pty Ltd* (2000) 97 FCR 361, 372 [48] (Mansfield J).

³⁷ *Corporations Act* (n 34) s 1056A.

³⁸ *Constitution* ss 71–2; Michelle Foster, 'The Separation of Judicial Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 672, 678, 682.

courts to interpret tribunals' jurisdictions in a way that does not offend the *Constitution*. Thus, the courts have held that AFCA's determinations do not determine existing rights, which would be similar to a judicial power, but rather create new rights.³⁹ Therefore, to be consistent with this constitutional theory, 'fair and reasonable' is understood as separate from the duties on trustees.⁴⁰ This generates the peculiar outcome where the superannuation trustee has no duty to make fair and reasonable decisions, but failing to make a fair and reasonable decision can result in the decision being overturned.⁴¹ This theoretical separation between the trustees' discretion and AFCA's role could support an argument that AFCA cases tell us nothing about trustees' discretions. While this point is valid, it is sufficient for the present study if AFCA cases *could* influence trustees' discretions.

Indeed, AFCA cases are very likely to influence trustees because the vast majority of complaints about trustees' death benefit decisions are resolved by AFCA. This study identifies 188 AFCA cases on the distribution of death benefits. A search of case law databases revealed only four cases in which judicial review of an AFCA death benefit decision was sought; none was successful.⁴² No cases were found that circumvented AFCA and directly claimed that a trustee's exercise of discretion was a breach of duty under general equitable principles.⁴³ This absence is notable as many potential cases are likely to be excluded from AFCA's jurisdiction by tight 28-day limits for lodging complaints,⁴⁴ leaving recourse to the general law as the only option.

III Literature and Case Law

Literature on how death benefit discretions are exercised, or should be exercised, is scarce. There are no academic legal analyses dedicated to this issue and practitioner commentaries are brief. However, there are relevant Federal Court cases and AFCA's own commentary on its decision-making. The commentary reveals two distinct perspectives on the exercise of discretion. One is that the purpose of the discretion is to ensure that distributions are flexible and tailored to the unique circumstances and complexities of the case. The other perspective is that the purpose of the discretion is to ensure that distributions are made to those who would have benefited from the deceased member's benefits if the member had not died.

The first perspective is associated with general trust law, which inclines towards giving trustees considerable discretionary latitude while expecting them to take the context and circumstances into consideration. For example, there is a general

³⁹ *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97, 133–4 [153] (Moshinsky, Bromwich and Derrington JJ).

⁴⁰ *Wan* (n 10) 106 [109] (Anastassiou J).

⁴¹ *Corporations Act* (n 34) s 1055(6).

⁴² *Tratter v Aware Super* [2023] FCA 491 ('Tratter'); *Wan* (n 10); *Reeves v Nulis Nominees (Australia) Ltd* (2022) 22 ASTLR 253; *Cummins v Petterd* [2021] FCA 646.

⁴³ General equitable principles impose duties to exercise discretions for a proper purpose, to act in good faith, to take into account relevant considerations, to not put weight on irrelevant considerations, and to not make a decision that is beyond the line of *Wednesbury* unreasonableness: *Karger v Paul* [1984] VR 161; *Pitt* (n 9); *Finch* (n 30); *Tonkin v Western Mining Corporation* (1998) 10 ANZ Insurance Cases 61–397.

⁴⁴ *Corporations Act* (n 34) s 1056(2).

duty on trustees to take into account all relevant considerations when making a decision.⁴⁵ General trust law also holds that trustees must consider any wishes expressed by the settlor, although they are not binding.⁴⁶ Professor Scott Donald reflects this perspective in a brief comment on death benefit discretions within a recent article:

It is a decision that requires the weighing of potentially multiple competing claims and, typically, consideration of an indeterminate set of factors such as the age and health of the dependants, their financial position and degree of dependency, and the presence of other potential sources of assistance. Some of the criteria are objectively quantifiable (age, financial position) and some require more judgment. The resolution of the full set is, however, indeterminate in the sense that the trustee must decide how to balance the factors, a determination for which there are no guidelines nor formulae.⁴⁷

This perspective is reflected in several articles by practitioners.⁴⁸ It suggests that when assessing whether an outcome is ‘fair and reasonable’ AFCA should adopt a broad approach that takes into account and gives weight to multiple competing considerations, and gives serious weight to any non-binding nomination or other expression of wishes.

The second perspective is associated with the statutory purpose of regulated superannuation trusts according to the interpretation of the SCT, the predecessor to AFCA. Practitioners McAlister and Purcell put it this way:

[I]t is generally considered that the death benefit should be paid to dependants who were financially reliant on the deceased or who might have been expected to receive financial support from the deceased in retirement. Certainly, this has been the approach of the Superannuation Complaints Tribunal.⁴⁹

This perspective suggests that when assessing whether an outcome is ‘fair and reasonable’ AFCA should adopt a narrow approach that applies a presumptive preference in favour of those who would have received financial support from the deceased, in the event they had not died.

These two perspectives are found in *Webb v Teeling*, a Federal Court of Australia appeal from an SCT case on distribution.⁵⁰ The SCT had determined that each of the deceased’s dependants should receive a benefit directly proportional to the amount of financial support they received from the deceased.⁵¹ This granted 26% to the deceased’s daughter, which differed from the deceased’s non-binding

⁴⁵ *Esso Australia Ltd v Australian Petroleum Agents’ and Distributors’ Association* [1999] 3 VR 642, 651–2 [39]–[41] (Hayne J); *Pitt* (n 9) 131 [40]–[41] (Lord Walker).

⁴⁶ *Re Baden’s Deed Trusts; McPhail v Doulton* [1971] AC 424, 457 (Lord Wilberforce); *Pitt* (n 9) 137 [66] (Lord Walker); *Australian Incentive Plan Pty Ltd v A-G (Vic)* (2012) 44 VR 661, [36] (Nettle JA).

⁴⁷ M Scott Donald, ‘Delegation by Superannuation Fund Trustees’ (2020) 37(5) *Company and Securities Law Journal* 319, 338 (citations omitted).

⁴⁸ Stephen Graham, ‘Death Benefits Contain a Sting’ (2010) 24(5) *Super Review* 12; Selwyn Black, ‘Who Gets the Superannuation Death Benefit? The Distribution of Superannuation Death Benefits’ (2020) 12(1) *FS Super: Journal of Superannuation Management* 40; Scott Hay-Bartlem, ‘Estate Planning and Superannuation: Current Issues’ (2021) 55(10) *Taxation in Australia* 543.

⁴⁹ McAlister and Purcell (n 12) 169.

⁵⁰ *Webb v Teeling* (2009) 3 ASTLR 186.

⁵¹ *Ibid* 193–4 [24]–[29] (Jagot J).

nomination that his daughter receive 50%. The complainant alleged that the SCT had applied a policy ‘resulting in an inflexible and mathematically exact apportionment’, gave ‘excessive weight to the beneficiaries’ financial dependence’ on the deceased, and thereby ignored the deceased’s nomination.⁵² These complaints reflect the perspective that the SCT and AFCA give overwhelming weight to financial dependence over all other considerations. However, the Court rejected these complaints and found sufficient evidence that the SCT had exercised a broad discretion. Jagot J found that the SCT had taken into account factors other than financial dependence, including the deceased’s nomination, because the SCT had stated that it had done so.⁵³ Very similar arguments were presented by counsel in *Tratter v Aware Super* in relation to AFCA. Counsel submitted that AFCA should have inquired into the financial needs of the eligible parties, should not have focused on financial dependency alone, and did not treat the deceased’s non-binding nomination appropriately.⁵⁴ Wheelahan J did not directly address the first two arguments but held that AFCA had treated the nomination appropriately by considering it.⁵⁵

In early 2022, AFCA published its own document explaining how it approached death benefit complaints,⁵⁶ which also included elements of both perspectives. On one hand, AFCA stated that, because it has the same powers and obligations as trustees, it is obliged to consider the same matters that trustees must consider.⁵⁷ It stated that non-binding nominations would generally be taken into account.⁵⁸ On the other hand, AFCA presented a narrow conception of the purpose of death benefit payments: to provide for those financially reliant on the deceased at the time of their death. AFCA also suggested that spouses, minor children and financial dependants will always be preferred over adult children and the deceased’s LPRs or estate.⁵⁹ This presents an inherent conflict as AFCA cannot be exercising a broad discretion that gives serious consideration to every relevant matter, including the settlor’s wishes, while also adopting a rule that some eligible individuals are presumptively preferred to others.

In 2023, the conflict between presumptive preferences and broad discretion surfaced in the case of *Wan*. A deceased member’s girlfriend claimed to the deceased’s superannuation trustee that they had been in a de facto relationship and, therefore, she was eligible to receive a distribution of the death benefit as her boyfriend’s dependant. The other eligible recipient was the deceased’s estate. In addition, the girlfriend relied on statements from the SCT to argue for a presumption that she as dependant should receive everything in preference to the estate; for example: ‘A trustee will generally only pay a benefit to the legal personal representative of a deceased member if there are no dependants or if there was such

⁵² Ibid 188 [5] (Jagot J).

⁵³ Ibid 199 [65].

⁵⁴ *Tratter* (n 42) [33]–[34] (Wheelahan J).

⁵⁵ Ibid [49].

⁵⁶ Australian Financial Complaints Authority (‘AFCA’), ‘The AFCA Approach to Superannuation Death Benefit Complaints’ (AFCA Approaches, May 2022).

⁵⁷ Ibid 6.

⁵⁸ Ibid 7.

⁵⁹ Ibid 6–8.

a direction in a binding death benefit nomination.⁶⁰ The girlfriend lost her case as the Court decided she was not in a de facto relationship. However, the Court added, in obiter, that there should be no rule, presumption or preference in favour of dependants over the estate as a broad discretion was given to the trustee.⁶¹ This case has been understood to have changed the law that applies to trustees who must choose between the deceased's dependants and estate.⁶² It could also be argued that it is authority that AFCA should not use any presumptive preferences. However, its impact on AFCA's practice is yet to be determined.

IV Research Questions

The legal framework, literature and case law surveyed above present a conflicted picture of how AFCA resolves death benefit complaints where trustees have a discretion to exercise. General trust law principles and *Webb v Teeling* both suggest that AFCA exercises a broad discretion that considers a wide range of factors. Practitioners in the field and AFCA's explanatory document suggest that AFCA exercises a much narrower discretion focused on financial dependence. This suggests a hypothesis:

If AFCA exercises a broad discretion over the distribution of death benefits, then distribution outcomes will be less strongly associated with individual factors.

General trust law principles also suggest a subsidiary question about the influence of the deceased member's wishes on distribution outcomes. The first subsidiary hypothesis is:

If AFCA gives real and genuine consideration to deceased members' non-binding nominations, then there will be a positive association between being nominated and receiving a distribution.

The decision in *Wan* raises the possibility that AFCA's use of presumptive preferences may have changed in response to the Federal Court decision. A second subsidiary hypothesis is:

If *Wan* changed AFCA's practice, then there will be a change in the association between distribution outcomes and individual factors in cases after the *Wan* decision.

Finally, in some cases either a binding nomination or a singular potential beneficiary purport to remove the trustees' discretion. In such cases, AFCA's decisions would be expected to comply with the regulations and also show no evidence of discretion.

V Methodology

This study adopts an empirical methodology to answer the research questions. An empirical analysis will enable insight into the patterns of AFCA's decisions that would be more difficult to obtain reliably with standard doctrinal legal methods.

⁶⁰ *Wan* (n 10) 102 [90] (Anastassiou J) (citations omitted).

⁶¹ *Ibid* 106–7 [110] (Anastassiou J).

⁶² Drummond and Allen (n 11) 104.

Essentially, it examines what AFCA does, rather than AFCA's somewhat inconsistent statements about what it does.

A Data

This study includes all AFCA cases that involve a complaint about the distribution of a death benefit by a superannuation trustee. It uses the entire population rather than a sample. The temporal range of study is all AFCA cases published up to 1 August 2023. This range was chosen in order to limit the study to one decision-maker. In 2018, AFCA replaced the SCT. AFCA has jurisdiction to hear complaints made after 1 November 2018, while complaints initiated before then were resolved by the SCT.⁶³ The end of the range was originally 31 May 2022, but was later extended to include cases after the decision in *Wan* was released.

The cases were obtained and selected through the AFCA website's 'search published decisions' page.⁶⁴ AFCA has the power to publish its decisions or to not publish if doing so would risk identifying the parties or for another compelling reason.⁶⁵ AFCA withheld 6.25% of death benefit distribution decisions between 1 November 2018 and 30 June 2022.⁶⁶ The AFCA website 'advanced search' function was used to select 'Death benefit distribution' from the 'Issue' dropdown menu. The search on 1 August 2023 produced a total of 201 results. Two were duplicate decisions, which left 199 unique decisions. An alternative search of 'death benefit' from the 'product name' dropdown menu reported additional decisions that concerned issues with death benefits other than their distribution (for example, decisions to not pay out insurance or to not pay out components of a defined benefit). These additional results were not included. Of the 199 included decisions, 6 involved issues other than the discretionary distribution of a death benefit, such as compensation for improperly withholding a death benefit; in 2, the trust deed removed all discretion from the trustee; and in 3 cases, AFCA remitted the distribution decision back to the trustee. These 11 cases were removed from the analysis, leaving 188 cases.

B Case Coding

The AFCA decisions were coded in REDCap,⁶⁷ a web-based software platform designed for collecting research data.⁶⁸ Each AFCA decision was entered into its own form. A coding schema with 77 fields was developed that was filled by entering

⁶³ AFCA, *Transitional Superannuation Guide* (2018).

⁶⁴ 'Search Published Decisions', *Australian Financial Complaints Authority* (Web Page) <<https://www.afca.org.au/what-to-expect/search-published-decisions>>.

⁶⁵ AFCA, *Complaint Resolution Scheme Rules* (Rules, 13 January 2021) [A.14.5]; AFCA, *Operational Guidelines to the Rules* (Guidelines, 1 April 2022) 75–6.

⁶⁶ Email from Heather Gray, Lead Ombudsman, Superannuation, AFCA to Tobias Barkley, 6 December 2022.

⁶⁷ Version 12.8.4, Vanderbilt University, Nashville, Tennessee, USA.

⁶⁸ Paul A Harris, Robert Taylor, Brenda L Minor, Veida Elliott, Michelle Fernandez, Lindsay O'Neal, Laura McLeod, Giovanni Delacqua, Francesco Delacqua, Jacqueline Kirby, Stephany N Duda and REDCap Consortium, 'The REDCap Consortium: Building an International Community of Software Platform Partners' (2019) 95 *Journal of Biomedical Informatics* 103208.

data into an online form. Only 46 of the variables were used in the analysis, including those in the following categories:

- Case variables: AFCA case number, date of the AFCA decision, date of the deceased's death, gender of the deceased member, quantum of death benefit to be distributed, and whether the case determines the distribution of a death benefit.
- Nomination variables: whether a nomination existed, date of the nomination, whether it was intended to be binding or non-binding, whether a binding nomination was invalid, and reason(s) why a binding nomination was invalid.
- Individual party variables: relationship with deceased, legal status of relationship with deceased, percentage of death benefit nominated by deceased, percentage of death benefit that would have been distributed by trustee, and percentage of death benefit distributed by AFCA.

The REDCap form included fields that allowed for up to seven individuals per case. Six cases involved more than seven individuals, which was recorded in an open text field and manually entered during analysis.

A research assistant was trained to enter data from the decisions into REDCap using the coding schema. Tobias Barkley also coded a representative group of 30 decisions and used that data to crosscheck the accuracy and consistency of the data entered by the research assistant.

C *Analysis*

After the AFCA decisions were coded into REDCap, the data was exported to SPSS,⁶⁹ a statistical software program for analysing data. Statistical analysis was carried out by the authors. The data was analysed in two ways: first, with the AFCA case as the item of study; and second, with each individual eligible to receive a death benefit as the item of study. The following additional variables were computed in SPSS:

- Case variables: number of individuals associated with case, category of case in relation to the legal framework, the value of death benefits simplified into quartiles, whether the case involved a distribution to an LPR rather than a dependant, and time between date of death and date of decision.
- Nomination variables: age of nomination at death.
- Individual party variables: whether the individual was distributed any death benefit by AFCA, whether nominated under a valid binding nomination, whether nominated under a non-binding nomination, whether nominated under a nomination less than four years old, whether nominated under a nomination more than three years old, whether financially dependent on the deceased, and whether a sole dependant or LPR in a case.

⁶⁹ Version 29.0.2.0 (20), IBM SPSS Statistics, IBM Corporation, Armonk, New York, USA.

Descriptive statistics were generated from the data on the AFCA cases. Analytical statistics were difficult to generate when cases were the unit of study. This was because within each AFCA case there could be multiple individuals eligible to receive a death benefit through the exercise of the trustee discretion. Therefore, in each case AFCA was required to make multiple decisions to determine how much each eligible individual should receive. This meant that at the case level it was difficult to identify a single target variable. In contrast, at the individual level the readily available target variable was the percentage of death benefit received by that individual from AFCA.

A categorical target variable was computed from the continuous percentage of death benefit variable: whether an individual received any distribution of the death benefit or no distribution. This was initially done for an exploratory analysis using Chi-square tests. It was continued because information on modelling categorical data was more accessible to the first author than tools for non-normally distributed continuous data, such as Tobit models.⁷⁰

To analyse the data, this study used decision trees and generalised linear mixed models. Decision trees, specifically classification trees, use algorithms to build models that resemble human reasoning and thus are relatively easy to interpret.⁷¹ They have been used to analyse judicial decision-making.⁷² However, classification trees include Chi-square tests that assume observations are independent, which is not satisfied in this study because the individuals are associated through the AFCA cases. To remedy this limitation, generalised linear mixed models were built. These models allow the incorporation of explanatory variables at the individual level (for example, whether an individual has been nominated) and the group level (for example, the number of individuals in a case).⁷³ Generalised linear mixed models do not assume that observations are independent.

D Limitations

Three limitations on this study are noted. The first is what data is recorded in AFCA cases. This limits the explanatory variables that can be tested. AFCA consistently records whether a potential claimant is financially dependent on the deceased and whether the deceased made a nomination. The age of the nomination and the amount of the death benefit are usually reported, but not always. Other potential explanatory variables appear in some cases but are not mentioned in most. For example, in some cases evidence of a deceased's wishes recorded in a will (rather than a nomination) were considered,⁷⁴ while in most cases they were not mentioned. In one case, financial need due to disability was considered relevant,⁷⁵ while in another case it

⁷⁰ See, eg, Theodore Eisenberg, Thomas Eisenberg, Martin T Wells and Min Zhang, 'Addressing the Zeros Problem: Regression Models for Outcomes with a Large Proportion of Zeros, with an Application to Trial Outcomes' (2015) 12(1) *Journal of Empirical Legal Studies* 161.

⁷¹ SB Kotsiantis, 'Decision Trees: A Recent Overview' (2013) 39(4) *Artificial Intelligence Review* 261.

⁷² Jonathan P Kastellec, 'The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees' (2010) 7(2) *Journal of Empirical Legal Studies* 202.

⁷³ Ronald H Heck, Scott L Thomas and Lynn N Tabata, *Multilevel Modeling of Categorical Outcomes Using IBM SPSS* (Routledge, 2012).

⁷⁴ *AFCA Case 637143* (29 May 2020); *AFCA Case 735102* (30 June 2021).

⁷⁵ *AFCA Case 761682* (29 March 2022).

was considered irrelevant,⁷⁶ and in most cases financial need was not considered at all. The gender of the deceased's dependants could be inferred in some cases, but in most cases reliable inferences were not possible.

The second limitation is that this study analysed the whole population of published AFCA cases. This population is not a valid sample of any larger population of actual decisions. This means that the findings cannot be generalised to disputes that are not published, disputes that are resolved in AFCA dispute resolution, disputes that are resolved by trustees, or disputes that are resolved privately. For example, in the published AFCA cases most attempts to create binding nominations fail, but this says nothing about the frequency with which binding nominations fail generally. However, the findings can be generalised to hypothetical complaints that could have been resolved by AFCA. Knowing how AFCA has decided the cases that have come before it allows us, and superannuation trustees, to make predictions about how AFCA would have decided the cases that did not come before it.

The third limitation is that the data extracted from these cases is made up of contested and indeterminate facts. An individual may be recorded in this study as being financially dependent on the deceased through being in a *de facto* relationship with the deceased. However, the conclusion that there was a *de facto* relationship may be reasonably contested or even rejected by the trustee. However, as this study concerns AFCA's decisions, this issue can be ignored. Thus, the facts extracted from the AFCA cases are the facts as determined by AFCA.

VI Results

The results of the statistical analysis of the data in SPSS are set out in this Part.

A AFCA Cases

There were 188 cases in which AFCA made a decision about the distribution of death benefits. In 174 of these cases, the amount of the death benefit left by the deceased member was stated by AFCA and in 14 cases the amount was not stated. The stated death benefits ranged from \$2,974 to \$1,474,721, as illustrated in Figure 1. The mean was \$246,743 and the median was \$188,500. In 182 of these cases, the date of death was reported as well as the date of the AFCA decisions, as illustrated in Figure 2. The time between these dates ranged from 0.6 to 6.4 years and the mean was 2.82 years. No generalisations can be made from this data as it is not a random sample from a larger population, but it illustrates the context of AFCA decisions.

⁷⁶ *AFCA Case 699515* (12 January 2020).

Figure 1: Amount of death benefit distributed, by frequency

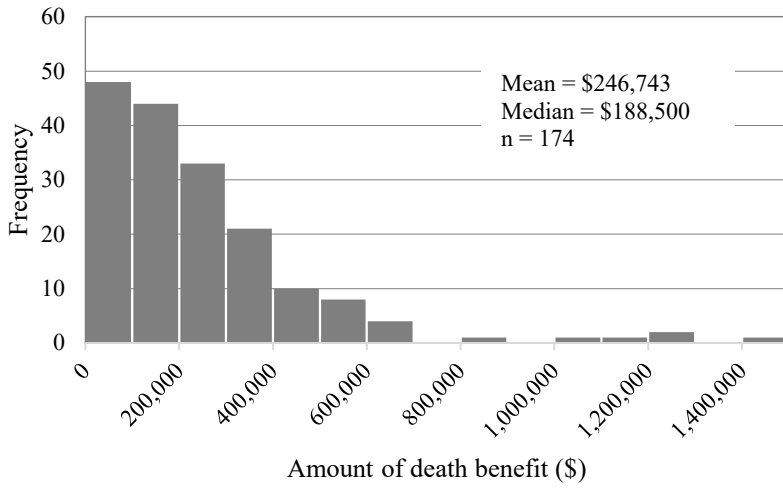
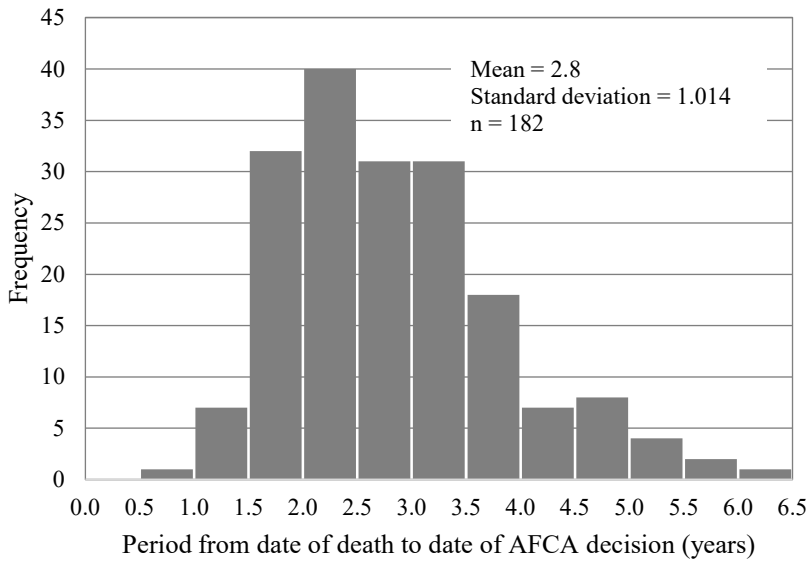


Figure 2: Period between date of death and date of decision, by frequency



Similarly, no generalisations can be drawn from data on the frequency of nominations. Nevertheless, as helpful context, these frequencies are set out in Table 1. Most cases (120, or 63.8%) involved a nomination. However, of the 37 attempts at binding nominations, only 9 were completely successful. The remainder were invalid for a variety of reasons, some overlapping, including nominating ineligible nominees (13); errors in execution or form (7); and lapse of time (9). Where attempts at binding nominations were unsuccessful, they were still evidence of the deceased's wishes so had the same status as non-binding nominations.

Table 1: Frequency and type of nomination

Existence	Type	Validity	Frequency	Per cent
Nomination	Binding	Valid	9	4.8
		Invalid	26	13.8
		Unclear ⁷⁷	2	1.1
	Non-binding		83	44.1
No nomination			68	36.2
Total			188	100.0

The 188 AFCA cases divide into four categories aligning with the legal framework, as set out in Table 2. In 9 cases, the distribution was entirely governed by a valid binding nomination. In 33 cases, there was only one dependant or only LPRs, which meant the trustee had no discretion to exercise as they only had one choice that complied with the regulations. Where there are multiple LPRs but no dependants, the trustee does not have a discretion as the LPRs jointly represent the estate. In 134 cases, there were multiple dependants or a dependant and an LPR, which meant the trustee had a discretion to choose between them. In the remaining 12 cases, there were no dependants or LPRs and the trustees had discretion to distribute to other people.

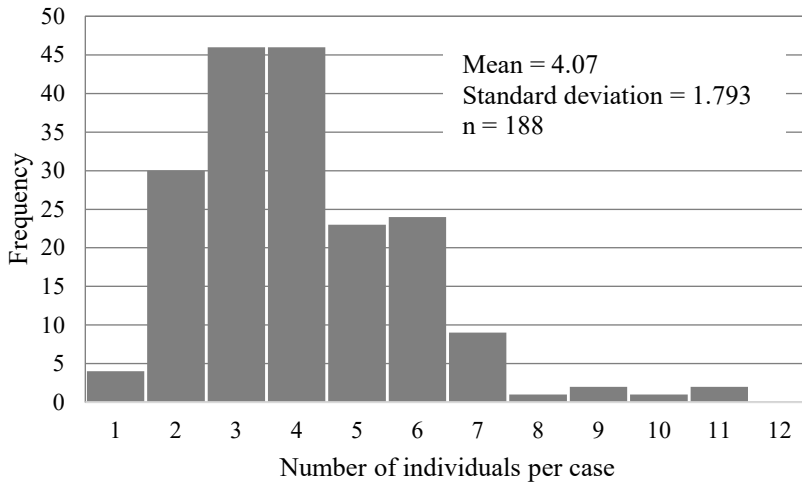
Table 2: AFCA cases according to legal framework categories

Case categories	Frequency	Per cent
Valid binding nomination	9	4.8
One dependant or LPR	33	17.6
Multiple dependants or LPRs	134	71.3
No dependants or LPRs	12	6.4
Total	188	100.0

⁷⁷ In one case, AFCA decided that it might have been possible to find that the nomination was binding due to changes in the legal understanding of 'stepchildren' but it was unnecessary as distribution to the LPRs benefited the same individuals: *AFCA Case 649502* (6 February 2020). In the other case, the trust deed required that the binding nomination be treated as partly valid where some nominees were eligible and some were not: *AFCA Case 825390* (30 September 2022). In contrast, the legislation only makes nominations binding where all nominees are eligible: *SIS Regulations* (n 4) reg 6.17A(4)(a).

The 188 AFCA cases contained multiple individuals as shown in Figure 3. As AFCA had to decide whether each individual should receive a distribution, this meant that, where AFCA had a discretion, each AFCA case involved multiple distribution decisions. This made analysis difficult as a single target variable that captured the distribution was not readily present for the case.

Figure 3: Number of individuals per case, by frequency



The significance of *Wan* was able to be tested at the case level. As noted above, the ratio of *Wan* was that AFCA should not have a default preference for dependants over the deceased estate. Table 3 is a contingency table that compares the number of cases where an LPR received a distribution with whether the case decision was made before or after *Wan*. The cases were limited to those where there were both an LPR and a dependant for the trustee to choose between. Table 3 shows that there has been no increase in the odds of AFCA distributing to an LPR since the decision in *Wan*. There is no statistically significant association between these two variables.⁷⁸

Table 3: Cross-tabulation of LPR receiving benefit with timing of case

		Before or after <i>Wan</i>		Total
		Before <i>Wan</i>	After <i>Wan</i>	
Both LPR and dependant present	LPR received distribution	6	2	8
	LPR did not receive distribution	24	21	45
Total		30	23	53

⁷⁸ Fisher’s Exact Test, two-sided: $p = 0.441$.

B *Individuals*

In response to the difficulty of analysis at the case level, the data on each of the 188 AFCA cases was restructured so that the individual, rather than the case, was the unit of study. A target variable was readily available for each individual, which was whether AFCA decided that the individual would receive a distribution of some of the death benefit. The explanatory variables for each individual included the following: number of other individuals in the relevant case, whether the individual was financially dependent on the deceased, and whether the individual was nominated by the deceased.

The restructure resulted in 779 individuals. Twenty-five of these individuals were the second role of a person already counted. For example, where an adult child was also an LPR they would be eligible to receive the death benefit either as a dependant or as LPR on behalf of the deceased's estate. Therefore, people with two roles were included as two discrete individuals.

The 779 individuals' relationships with the respective deceased members are shown in Table 4. Some important relationships were current or former spouses (18.6%), adult children (30.2%), minor children (9.4%), and stepchildren (4.6%). While parents (11.9%) and siblings (10.4%) were also frequently involved, they usually did not have the priority status of dependants under the legislation. The AFCA cases include information that allows the categorisation of dependants as financially dependent under the ordinary meaning of dependence, dependent according to the statutory inclusion of spouses and children, or both. Most spouses and minor children were dependants both through statutory inclusion and the ordinary meaning of dependence. Most adult children were only dependants through statutory inclusion.

Table 4: Cross-tabulation of dependants and LPRs according to relationship with deceased member and legal status of relationship

		Legal status of relationship					Total
		Financial and statutory dependant	Financial dependant not statutory dependant	Statutory dependant not financial dependant	LPR	Neither LPR nor dependant	
Relationship	Spouse at death	77	1	3	0	0	81
	Separated, former or divorced spouse	10	5	22	0	27	64
	Minor child	66	0	7	0	0	73
	Adult child	19	0	215	0	1	235
	Stepchild	4	0	32	0	0	36
	Parent	3	8	10	9	63	93
	Sibling	3	2	0	19	57	81
	Secondary role	0	0	0	25	0	25
	Other	3	1	6	25	56	91
Total		185	17	295	78	204	779

Figures 4 and 5 present the mean and median percentage distribution of the death benefit according to individuals' relationship with the deceased. These charts reflect all individuals including those who received nothing. The median chart (Figure 5), in which the median value is zero for all individuals apart from spouses and minor children, demonstrates that the frequency of receiving a benefit was significantly lower for all other types of relationships.

Figure 4: Mean percentage of death benefit received, by relationship

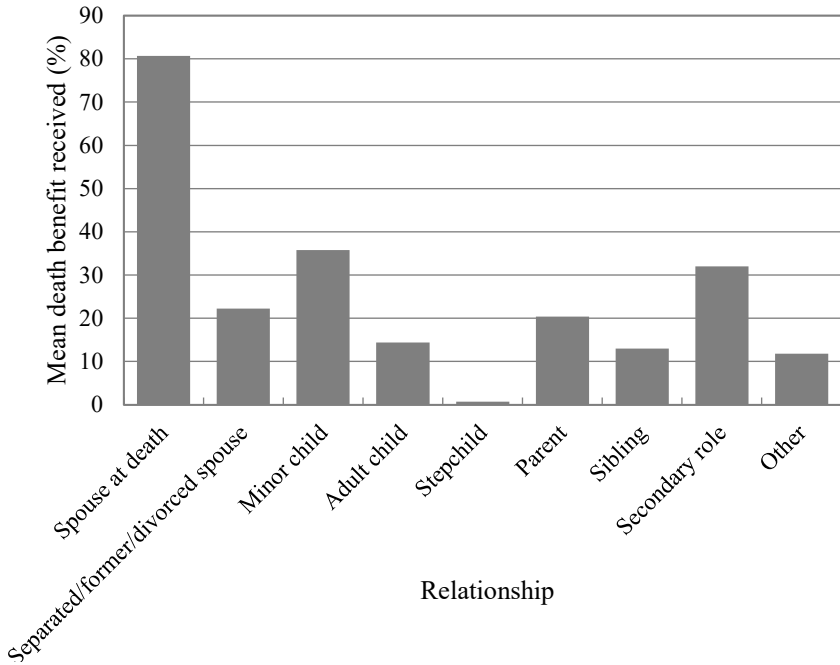
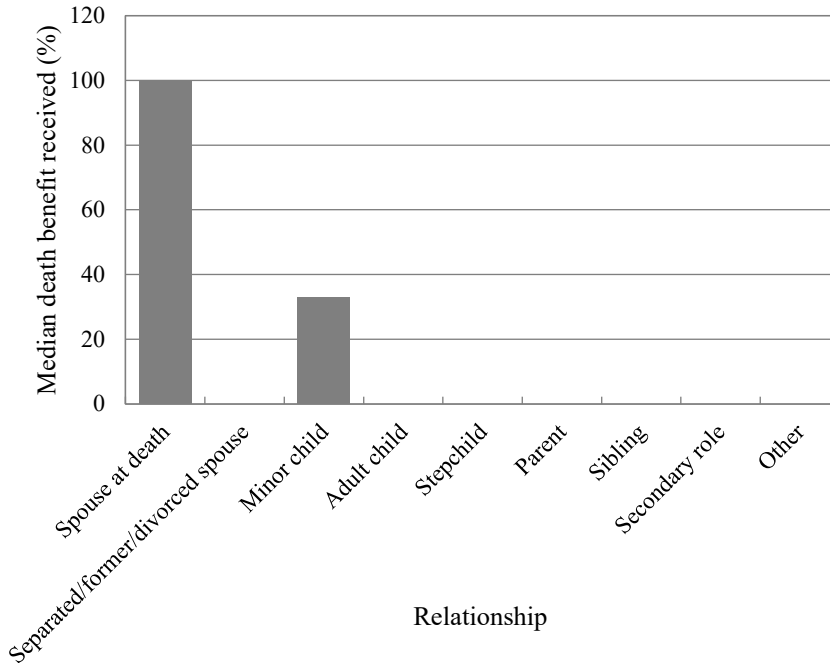


Figure 5: Median percentage of death benefit received, by relationship



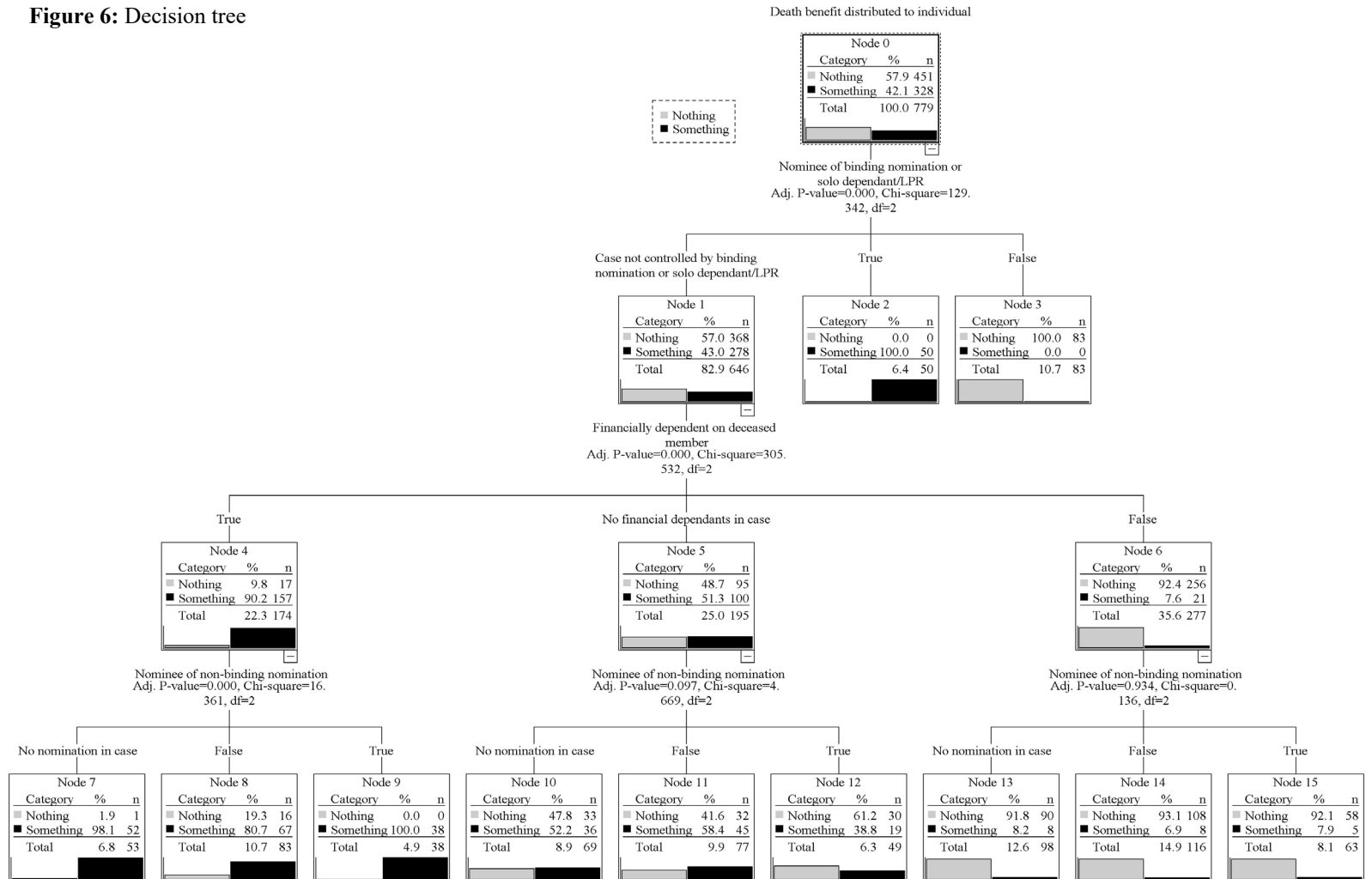
The first analysis of the 779 individuals is presented in the decision tree in Figure 6. This method uses machine learning to classify individuals into nodes according to the influence of distinct variables and visualises the structure of the data. The target variable is whether an individual received some of the death benefit from AFCA or received nothing. The outcome of this variable is presented in the tables and bar charts in Figure 6. Node 0 includes all 779 individuals, which shows that 328 individuals received a distribution and 451 did not.

The first explanatory variable (nodes 1, 2 and 3) classifies individuals according to the case categories. This variable is answered ‘True’ if the individual was nominated under a binding nomination or was the sole dependant or LPR in a case. As expected, AFCA followed the legislation and distributed 100% to these individuals (node 2) and 0% to other individuals in those same cases who were either not nominated or not the sole dependant/LPR (node 3). The third category (node 1) carries the individuals who were in other types of cases forward to the next variable.

The next variable encountered is whether the individual was financially dependent on the deceased. This has a strong effect: 90.2% of financial dependants received something (node 4). The difference between nodes 5 and 6 shows how not being a financial dependant is associated with a significantly lower chance of receiving something when competing for the distribution with a financial dependant (7.6%, node 6) than when there are no financial dependants (51.3%, node 5).

The final variable encountered is whether the individual is nominated by the deceased in a non-binding nomination (nodes 7 to 15). The shapes of the bar charts show that each group of three nodes is quite similar to that group’s preceding node in the tree. For example, nodes 13, 14 and 15 have a similar distribution to node 6, which they stem from. Indeed, only in the left group does nomination have a statistically significant relationship with the outcome (nodes 7 to 9). Being nominated while also a financial dependant is associated with an increased chance of distribution (node 9), whereas being nominated while not financially dependent does not increase the chance to a level that registers as statistically significant with the Chi-square test (node 12). Indeed, node 12 shows a smaller proportion of individuals nominated by the deceased member receiving a benefit than others in that branch of the decision tree.

Figure 6: Decision tree



These results can be further detailed by comparing the average amount of benefit received. The average percentage distribution for the 157 financial dependants at node 4 who received a distribution was 61%. In contrast, the average benefit for the 21 who were not financially dependent but received something at node 6 was 24%. These 21 included 11 adult children and one spouse, none of whom received more than 25%; five parents of the deceased members who were in interdependency relationships with them, but without being financially dependent on their child; and LPRs in three cases.⁷⁹ The average for those in node 5 who were not financially dependent but who received something was 45%, which occurred in cases where there were no financial dependants to compete with.

A critical limitation on the decision tree is that it uses Chi-square tests, which assume that observations are independent. However, the individuals are not independent but associated with each other in the cases. To allow for the lack of independence in the observations, the individuals were analysed with a generalised linear mixed model ('GLMM').

Another limitation on the decision tree in Figure 6 is that it takes in all individuals, including those who are ineligible to receive a benefit under the legal framework. That is, some of those in nodes 12 and 15 who were nominated but did not receive anything would have been in that position because of the legal framework rather than AFCA's decision to exclude them. For example, a parent who is nominated in a case where there is an eligible de facto partner will not receive anything because they are not a dependant and the de facto partner is. To refine the GLMM analysis, the data was filtered to exclude individuals who were ineligible due to the legal framework. Individuals in cases that were decided by a binding nomination or a sole dependant/LPR were excluded, as were those who were neither dependants nor LPRs in cases where there were dependants or LPRs. This resulted in 549 individuals in 146 cases. For the first GLMM, individuals were also excluded where data on the size of the death benefit was missing. This resulted in 522 individuals in 139 AFCA cases being included in the GLMM.

The GLMM allows the influence of variables that apply at the case level (such as the number of individuals in the case and the size of the death benefit) to be compared to the influence of variables that apply at the individual level (such as financial dependence and nomination). The data structure for the model grouped individuals within their associated case. The target categorical variable was the same as for the decision tree: whether the individual received some or none of the death benefit. Four explanatory variables were included as fixed effects: case level variables included the number of individuals in the case and the size of the death benefit; individual level variables included the individual's financial dependence and the individual's nomination. Interaction effects were tested for all variables and

⁷⁹ Regarding the LPRs, in one case, an individual nominated under a binding nomination had died prior to the decision and AFCA determined that in that circumstance their share must go to the estate: *AFCA Case 616775* (6 August 2019). In another case, the only dependants were also beneficiaries under the estate and did not object to the trustee's decision to distribute to the LPR: *AFCA Case 662176* (17 December 2021). In the final case, a former de facto spouse had limited financial dependence on the deceased member related to a shared mortgage so received a limited distribution, which left the remainder to go to the estate: *AFCA Case 856722* (31 January 2023).

excluded as none were statistically significant. A binomial distribution and logit link function were used, as appropriate for a categorical target variable.

The results of the first GLMM are presented in Table 5. At the case level, it demonstrates that the number of individuals in a case has a statistically significant relationship with whether the individual receives a distribution. The negative direction of the estimation shows that as the number of individuals in a case increases, the odds of any one of them receiving something reduces. In contrast, the size of the death benefit has no statistically significant relationship with the target variable. At the individual level, the financial dependence of an individual has a very strong and statistically significant relationship with whether the individual receives a distribution. There is 95% confidence that an individual who is financially dependent on the deceased is between 24 and 100 times more likely to receive a benefit than someone who is not financially dependent. In contrast, there is no statistically significant relationship between being nominated in a non-binding nomination and receiving a benefit from AFCA. We cannot reject the null hypothesis that there is no association between nomination and outcomes. The intercept is the remaining variance between the 139 cases after the case level variables are accounted for.

Table 5: Generalised linear mixed model for AFCA distribution^a

Parameter	Estimate	Standard error	<i>p</i> -value	Odds ratio	95% confidence interval for odds ratio	
					Lower	Upper
Intercept	0.005	0.6404	0.994	1.005	0.285	3.535
Individuals per case	-0.307	0.0898	<0.001	0.735	0.617	0.877
Size of death benefit	0.170	0.1503	0.260	1.185	0.882	1.592
Financial dependence	3.902	0.3600	<0.001	49.480	24.396	100.355
Non-binding nomination	0.302	0.3341	0.367	1.352	0.702	2.607

N(individuals) = 522

N(cases) = 139

Probability distribution: Binomial

Link function: Logit

Overall per cent correct: 87.0%

^a Target: Received part or all of the death benefit from AFCA

A second GLMM was created with the nomination variable split into two variables according to the age of the nomination at the time of the deceased's death. The split was made between nominations that were less than or equal to three years old and those older than three years. This split fits the assumption behind the regulations that it may not be appropriate to follow nominations older than three years. The variable regarding the size of the death benefit was removed as it was

statistically insignificant, which meant a few more cases were included. The results are presented in Table 6. The GLMM demonstrates that, while recent nominations are somewhat closer to a statistically significant association with the target variable than older nominations, they still do not surmount the standard measure of significance: a p -value less than 0.05.

Table 6: Generalised linear mixed model for AFCA distribution^a

Parameter	Estimate	Standard error	p -value	Odds ratio	95% confidence interval for odds ratio	
					Lower	Upper
Intercept	0.600	0.4405	0.174	1.823	0.767	4.330
Individuals per case	-0.347	0.0880	<0.001	0.707	0.594	0.840
Financial dependence	3.998	0.3615	<0.001	54.478	26.781	110.820
Recent nomination	0.665	0.4764	0.163	1.944	0.763	4.957
Older nomination	0.370	0.4719	0.433	1.448	0.573	3.659

N(individuals) = 549

N(cases) = 146

Probability distribution: Binomial

Link function: Logit

Overall per cent correct: 87.4%

^a Target: Received part or all of the death benefit from AFCA

Table 7 presents an analysis of the influence of *Wan* on AFCA decision-making. A dummy variable is included for whether cases are post-*Wan*. Interactions with the other variables are also included. There is a statistically significant difference to the target variable between cases before and after *Wan*, which appears in the interaction between the number of individuals per case and whether the case is after *Wan*. In cases before *Wan*, an individual's log odds of receiving something reduces by 0.577 every time another individual is included in the case. In cases after *Wan*, the individual's log odds of receiving something reduce by 0.181 (-0.577 + 0.396) which is a statistically significant reduction in the effect. However, importantly, there is no significant interaction with the other variables. That means there is no evidence that cases after *Wan* are associated with a *change* in association between financial dependence and receipt of a benefit. Neither is there evidence that cases after *Wan* are associated with a change in the lack of association between non-binding nominations and receipt of a benefit.

Table 7: Generalised linear mixed model for AFCA distribution^a

Parameter	Estimate	Standard error	<i>p</i> -value	Odds ratio	95% confidence interval for odds ratio	
					Lower	Upper
Intercept	1.231	0.6123	0.045	3.426	1.029	11.405
Individuals per case	-0.577	0.1313	<0.001	0.562	0.434	0.727
Financial dependence	4.268	0.4728	<0.001	71.362	28.191	180.644
Non-binding nomination	0.679	0.4498	0.132	1.971	0.815	4.770
Post- <i>Wan</i>	-0.935	0.8557	0.275	0.392	0.073	2.107
Post- <i>Wan</i> : Individuals per case	0.396	0.1735	0.023	1.486	1.057	2.090
Post- <i>Wan</i> : Financial dependence	-0.455	0.7827	0.561	0.634	0.136	2.951
Post- <i>Wan</i> : Non-binding nomination	-0.555	0.6505	0.394	0.574	0.160	2.061

N(individuals) = 549

N(cases) = 146

Probability distribution: Binomial

Link function: Logit

Overall per cent correct: 85.6%

^a Target: Received part or all of the death benefit from AFCA

Finally, there was no evidence that AFCA fails to give effect to valid binding nominations. In the nine cases where AFCA found a valid binding nomination AFCA distributed according to the nomination.

VII Discussion and Implications

The results of this study present clear answers to the research questions. First, it is apparent that AFCA exercises a relatively narrow discretion where outcomes are strongly associated with a single explanatory variable: financial dependence on the deceased. In cases where a discretion is exercised and AFCA has the option to choose a financial dependant, 90.2% of financial dependants receive something and only 7.6% of those not financially dependent receive something. The odds of receiving something as a financial dependant are between 24 and 100 times that of someone not financially dependent. While factors related to adult children (other than financial dependence) are occasionally taken into account, the results demonstrate a strong association between outcomes and this single factor. Where those not financially dependent do receive something, the quantity of benefits

received are also considerably smaller than those received by financial dependants. This suggests that AFCA's approach is a narrow discretion where the presumptive preference for financial dependants is only rarely displaced.

Second, the results fail to establish that AFCA gives any real or genuine consideration to the deceased's wishes expressed in non-binding nominations. This contradicts AFCA's claim that these wishes are taken into account. To demonstrate that some factor was being given real and genuine consideration in decisions, it would not need to have influence on every decision, but it would need to demonstrate some influence on outcomes in the aggregate. The fact that even recent nominations, less than three years old, do not have a statistically significant association with outcomes contradicts any claim that only outdated preferences are discounted.

Third, the *Wan* case has had no discernible impact on AFCA's practice of decision-making. The lack of evidence for an association between nominations and distribution outcomes persists in the cases after *Wan*. Likewise, the evidence for a strong relationship between financial dependence and distribution outcomes persists in the cases after *Wan*. The proportion of cases in which an estate rather than a dependant received a distribution did not increase after *Wan*. This suggests that AFCA's practice has not changed following *Wan*, at least to the date of this study.

Fourth, there is evidence that AFCA makes decisions that are consistent with the regulations. In the nine cases where AFCA found a valid binding nomination, the percentage distribution was consistent with the percentage nomination. In addition, when these cases are combined with the 33 cases where AFCA had no discretion (because there was only one eligible beneficiary) to identify 133 individuals, all 50 of those who were eligible to receive something did so and none of the 83 who were not eligible received anything. A significant caveat regarding the binding nominations is that only nine were completely valid, while 26 were invalid. This demonstrates that binding nominations have been an unreliable solution in *some* cases. However, further conclusions about the frequency of problems with binding nominations cannot be drawn from this data because there may be bias in which binding nominations are subjects of complaint to AFCA.

The broader question raised by these results is whether they reveal a normative failing in the superannuation death benefits system. That is, is it right that AFCA and trustees place no discernible weight on nominations and considerable weight on financial dependence? Empirical evidence cannot answer these normative questions. However, the insights from the evidence ground a strong argument that reform is required.

Binding nominations should be reformed. Regardless of our inability to generalise from the data, the 26 invalid attempts at binding nominations suggest that the regulations are thwarting rather than facilitating superannuation members' choices. Solutions could include allowing binding nominations to be saved in a similar way to informal wills or by upholding partially valid nominations.

Non-binding nominations must also be reformed because there is no evidence they affect outcomes. Indeed, the fact that non-binding nominations are offered to members, but do not have any statistically significant association with distribution outcomes, is misleading. Offering members the opportunity to express their

preferences generates a reasonable expectation that their preferences will be given weight. It creates a false sense of security for members, which is poor policy. One option for reform is to simply remove non-binding nominations. Trustees could do this without any central regulation, although a consistent approach would be better for members. A more difficult option would be to reform how AFCA and trustees exercise discretions so that more weight is given to non-binding nominations.

This leads to the broader consideration of whether granting trustees, and AFCA, discretion is good policy. The advantage of discretion over the distribution of death benefits is that it allows outcomes to be tailored to circumstances as they arise. The disadvantage is additional cost and delay. The current system appears to create the problems of discretion but without the advantages. First, an average of 2.82 years before a decision is made represents a considerable delay following a death and is likely to cause harm to relatives of the deceased, for example, through eligible beneficiaries dying during the process. Second, AFCA's current approach largely nullifies the advantages of discretion by deciding outcomes very consistently with the single consideration of financial dependence. Other important considerations, such as family violence, appear to be excluded from the discretion. This is morally insupportable, particularly because there is no compelling reason to exclude these considerations. An illustrative case, from the SCT, is *Ievers v Superannuation Complaints Tribunal*, which involved the tragic suicide of a 20 year old.⁸⁰ The SCT had to decide whether to distribute to the deceased's de facto partner, or to her estate (which would be distributed to the deceased's mother). The SCT found that the de facto partner was arguably abusive.⁸¹ The police submitted evidence that the partner was controlling, including prohibiting the deceased from accepting lifts home from work in the rain, and the relationship involved elements of escalating abuse.⁸² The Coroner's report concluded that it was likely that domestic violence contributed to the deceased's suicide.⁸³ Nevertheless the SCT distributed the entire benefit to the partner on the ground he alone had a right to look to the deceased for financial support.⁸⁴ The value of discretion is to take into account considerations such as these, but the current system does not allow it. While it may be possible to reform the system so that discretion is exercised more responsively to the circumstances, this will likely add further delay and cost.

An immediate solution was proposed in January 2024 by the Law Council of Australia.⁸⁵ The proposal is that all death benefits automatically form part of the deceased's estate except where the deceased has made a valid binding nomination. This proposal removes discretion from trustees and AFCA, and should reduce delays for relatives and costs for trustees. The proposal would be an effective solution for the problems identified in this article.

⁸⁰ *Ievers v Superannuation Complaints Tribunal* (2018) 160 ALD 96 ('*Ievers*').

⁸¹ *D14-15\227* [2015] SCT 82, [30] (Presiding Member Anderson and Member Duffield) ('*D14-15\227*').

⁸² *Ibid* [39] (Presiding Member Anderson and Member Duffield).

⁸³ *Ibid* [41] (Presiding Member Anderson and Member Duffield).

⁸⁴ *Ievers* (n 80) [71]; *D14-15\227* (n 81) [49] (Presiding Member Anderson and Member Duffield).

⁸⁵ Letter from Greg McIntyre, Law Council of Australia President to Jim Chalmers and Stephen Jones, 12 January 2024 <<https://lawcouncil.au/resources/submissions/proposed-reform-to-superannuation-death-benefits>>.