SUPERANNUATION AS CHARITABLE BEQUESTS: REFORMING SUPERANNUATION INHERITANCE LAW TO INCREASE CHARITABLE GIVING

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The Australian Government seeks to double charitable giving by 2030. At the same time, Australians are experiencing the greatest intergenerational wealth transfer in history, with superannuation a driving force behind this growth in inheritance. An opportunity therefore exists to increase charitable giving using superannuation bequests. While the superannuation system was designed to provide income during retirement, most Australians now die with the majority of their superannuation intact. Excess superannuation is inherited as death benefits, outside a will, and is governed by federal legislation and superannuation fund trust deeds. This 'superannuation inheritance law' determines who can receive superannuation death benefits and to what extent.

This article examines the legal implications of using superannuation to make charitable bequests, with a view to promoting philanthropy. Under current law, it is not possible for a superannuation fund member to directly nominate a charity as a death benefit recipient. Instead, the member must nominate the legal personal representative of their deceased estate and include the charity in their will. In addition, a tax applies when a charity receives superannuation death benefits through a deceased estate. Supported by empirical findings from a novel dataset of cases involving disputes over death benefits, we argue that these legal impediments to charitable giving are unjustified and should be removed by legislation.

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I Introduction

The Australian Government is seeking to double philanthropy by 2030.[1] At the same time, Australians are experiencing the greatest intergenerational wealth transfer in history.[2] Unfortunately, the available data suggests that charitable bequests in Australia are very small, with less than 2% of inheritances going to charity.[3] A recent Productivity Commission inquiry thus identified charitable bequests as an opportunity to increase philanthropic giving.[4] In this article, we examine a key opportunity for increasing charitable bequests highlighted in

1 Andrew Leigh, 'Labor to Double Philanthropic Giving by 2030' (Media Release, 7 April 2022) <https://www.andrewleigh.com/labor_to_double_philanthropic_giving_by_2030_media_release>, archived at <https://perma.cc/3FGX-MQF4> ('Labor Media Release').

2 Productivity Commission, 'Wealth Transfers and Their Economic Effects' (Research Paper, November 2021) 4, 62 ('Wealth Transfers').

3 Ibid 4, 71, 97. See also John McLeod, JBWere Australia, *The Bequest Report: Reshaping Australia by Passing on More than Assets* (Report, July 2024) 13, 20 ('*Bequest Report*').

4 Productivity Commission, *Future Foundations for Giving* (Inquiry Report No 104, 10 May 2024) 300–1 ('*Future Foundations for Giving*').

the Productivity Commission's report,[5] and recognised by the peak body for philanthropy in Australia as a top priority:[6] superannuation death benefits.

Australia's compulsory superannuation system provides a rich source of potential charitable bequests.[7] Together with the family home, superannuation is now the principal source of wealth for most working Australians.[8] While the objective of superannuation is 'to preserve savings to deliver income for a dignified retirement',[9] superannuation has become a significant form of inheritance. Most Australians now die with the majority of wealth they had when they retired,[10] including most of their superannuation balances.[11] This is partially driven by retirees' desire to financially protect their households, and their failure to spend most of their precautionary savings for health and long-term

[5] Ibid.

[6] Philanthropy Australia, *A Blueprint to Grow Structured Giving: How Australia Can Double Structured Giving by 2030* (Report, April 2021) 17 ('*Blueprint to Grow Structured Giving*'). Philanthropy Australia subsequently commissioned a report on charitable superannuation bequests: Angela Jackson and Emily Millane, Impact Economics and Policy, *Charitable Superannuation Bequests: Making Giving Easy* (Report, October 2023) 2, 4 <https://www.philanthropy.org.au/wp-content/uploads/2023/10/Making-Giving-Easy-report-October-2023.pdf>, archived at <https://perma.cc/K3ZE-2QTM> ('*Charitable Superannuation Bequests*').

[7] Employers are required to contribute 12% of an employee's earnings to a superfund and employees can make additional voluntary contributions. Australia also has an age pension. Note that self-employed Australians have self-managed super funds ('SMSF') to which different rules apply. See Treasury (Cth), 'Legislating the Objective of Superannuation' (Consultation Paper, 20 February 2023) 6 <https://treasury.gov.au/sites/default/files/2023-02/c2023-361383.pdf>, archived at <https://perma.cc/8DTN-BBFH>.

[8] The Productivity Commission found that total household wealth is dominated by housing (39%) and superannuation (21%): Productivity Commission, 'Rising Inequality? A Stocktake of the Evidence' (Research Paper, August 2018) 78 <https://www.pc.gov.au/inquiries-and-research/rising-inequality/>, archived at <https://perma.cc/QZL2-6ALF> ('Rising Inequality').

[9] *Superannuation (Objective) Bill 2024* (Cth) s 5(1). See generally VW FitzGerald, *National Saving: A Report to the Treasurer* (Australian Government Publishing Service, 1993) pt 4.

[10] Treasury (Cth), *Retirement Income Review* (Final Report, July 2020) 51, 369 <https://treasury.gov.au/sites/default/files/2021-02/p2020-100554-udcomplete-report.pdf>, archived at <https://perma.cc/BJ2P-5LVU> ('*Retirement Income Review*').

[11] Commonwealth Treasury cites data from a large superannuation fund, showing that at death members left 90% of the superannuation balance they had at retirement: ibid 432. It also cites a study on age pensioners which reported similar findings: ibid, citing Asher et al, 'Age Pensioner Decumulation: Responses to Incentives, Uncertainty and Family Need' (2017) 42(4) *Australian Journal of Management* 583, 585.

care expenses before they die.[12] These excess superannuation balances are passed on to others as death benefits.[13] With tax concessions, the total amount of superannuation inheritances in Australia is projected to grow from $17 billion in 2019 to $130 billion in 2059.[14]

Superannuation does not automatically form part of a person's deceased estate.[15] As a result, the distribution of superannuation death benefits is not automatically governed by ordinary, state-based inheritance law. Instead, a body of superannuation-specific inheritance law mainly comprising federal legislation and regulations determines who can receive superannuation death benefits and to what extent.[16] Trust deeds of superannuation funds ('superfunds') also form part of this 'superannuation inheritance law'.[17] In this paper superfunds are defined as those regulated by the Australian Prudential Regulation Authority ('APRA'), which represent approximately two-thirds of the superannuation system based on total value of assets,[18] and self-managed superannuation funds ('SMSFs'), which are regulated by the Australian Taxation Office ('ATO')[19] and disproportionately held by wealthy Australians.[20] The general law of equity and

12 Jennifer Alonso-García et al, 'Saving Preferences after Retirement' (2022) 198 (June) *Journal of Economic Behavior and Organization* 409, 427–8. See generally Geoffrey Kingston and Lance Fisher, 'Down the Retirement Risk Zone with Gun and Camera' (2014) 33(2) *Economic Papers* 153; Jie Ding, Geoffrey Kingston and Sachi Purcal, 'Dynamic Asset Allocation when Bequests are Luxury Goods' (2014) 38 (January) *Journal of Economic Dynamics and Control* 65.

13 *Retirement Income Review* (n 10) 12.

14 Ibid 369.

15 *Ioppolo v Conti* [2013] WASC 389, [26] (Master Sanderson).

16 See below Part II.

17 Ibid.

18 *Retirement Income Review* (n 10) 80, noting that the remainder are held by self-managed superannuation funds, balance of life office statutory funds or exempt public sector superannuation schemes.

19 Ibid. Section 17A of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*') sets out certain conditions that a superannuation fund must satisfy in order to be an SMSF, including having fewer than five members all of whom must be trustees or directors of the corporate trustee.

20 The average assets per SMSF member in June 2025 was $881,000: 'Highlights: SMSF Quarterly Statistical Report June 2025', *Australian Taxation Office* (Web Page, 3 September 2025) <https://www.ato.gov.au/api/public/content/0-1fa8b8a1-1773-4253-9ee2-22bcf5d8f751>, archived at <https://perma.cc/67RH-5MHU>. This compares with the average account balance of APRA-regulated superfunds, which was $121,188 as of 30 June 2024: 'Annual Superannuation Bulletin: Highlights', *Australian Prudential Regulation Authority* (Web Page, 2024) <https://www.apra.gov.au/annual-superannuation-bulletin-highlights-0>, archived at <https://perma.cc/45GC-243T>.

trusts governs superfunds to the extent consistent with federal legislation,[21] although it imposes little restriction on the distribution of death benefits.[22]

To date, only a few legal scholars have considered Australia's superannuation inheritance law.[23] In particular, Professors Nicola Peart and Prue Vines identified superannuation death benefits as the most significant 'will substitute' in Australia.[24] Professor Miranda Stewart examined the tax exemption for superannuation death benefits paid to dependants, especially for people in interdependency relationships.[25] Using machine learning techniques, Dr Tobias Barkley and Dr Xia Li empirically analysed how superannuation death benefits have been distributed by the Australian Financial Complaints Authority ('AFCA')[26] — the federal body that resolves superannuation complaints involving APRA-regulated superfunds.[27]

In this article, we build on these important scholarly contributions to superannuation inheritance law by undertaking the first comprehensive analysis of

21 *SIS Act* (n 19) s 350. See generally M Scott Donald, 'The Pension Trust: Fit for Purpose?' (2019) 82(5) *Modern Law Review* 800 ('Pension Trust'); David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013).

22 Tobias Barkley and Xia Li, 'An Empirical Study of the Distribution of Superannuation Death Benefits' (2024) 46(2) *Sydney Law Review* 199, 200.

23 Ibid 205. By comparison, the literature on other aspects of superannuation law and policy is large: see generally Geoffrey Kingston and Susan Thorp, 'Superannuation in Australia: A Survey of the Literature' (2019) 95(308) *Economic Record* 141. See also Donald, 'Pension Trust' (n 21); M Scott Donald, 'Choice in Super' (2025) 48(1) *University of New South Wales Law Journal* 278.

24 Nicola Peart and Prue Vines, 'Will-Substitutes in New Zealand and Australia' in Alexandra Braun and Anne Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart Publishing, 2016) 107, 121–2. First coined by United States scholar Professor John Langbein, 'will substitutes' are assets which are transferred upon death outside of probate: John H Langbein, 'The Nonprobate Revolution and the Future of the Law of Succession' (1984) 97 *Harvard Law Review* 1108, 1109, 1125–6. More recently, Professors Stewart Sterk and Melanie Leslie found that retirement accounts have been identified as 'the most significant nonprobate asset for most Americans': Stewart E Sterk and Melanie B Leslie, 'Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession' (2014) 89(1) *New York University Law Review* 165, 167. For a discussion of death benefits available for pension schemes in England and Wales, see Alexandra Braun, 'Pension Death Benefits: Opportunities and Pitfalls' in Birke Häcker and Charles Mitchell (eds), *Current Issues in Succession Law* (Hart Publishing, 2016) 231.

25 Miranda Stewart, '"Are You Two Interdependent?" Family, Property and Same-Sex Couples in Australia's Superannuation Regime' (2006) 28(3) *Sydney Law Review* 437, 438–9.

26 Barkley and Li (n 22) 201.

27 'Enabling Legislation', *Australian Financial Complaints Authority* (Web Page) <https://www.afca.org.au/about-afca/rules-and-guidelines/enabling-legislation>, archived at <https://perma.cc/UV2A-A2S8>.

the legal implications of — and impediments to — making charitable bequests with superannuation death benefits. In doing so, we seek to reform Australian superannuation inheritance law with a view to promoting philanthropic giving, intergenerational and intragenerational equity, as well as testamentary freedom. To this end, we will argue that the main legal impediments to making charitable bequests with superannuation death benefits should be removed by legislation on normative grounds. The legal impediments we seek to eradicate are: (1) superfund members' inability to directly nominate a charity in their death benefit nominations given to superfund trustees; and (2) a tax on charitable giving from the superannuation component of a deceased estate.[28]

To help substantiate our normative claims, we present a novel dataset of 269 AFCA decisions.[29] This dataset covers all AFCA decisions resolving complaints about the distribution of death benefits published on or before 31 December 2025.[30] It expands Barkley and Li's dataset of 188 AFCA decisions by covering more decisions and more variables per decision.[31] In particular, unlike Barkley and Li's dataset, our dataset has variables about the deceased member's will;

[28] See below Part II.

[29] To produce this dataset, we first selected '[d]eath benefit distribution' under the '[i]ssue' menu on each of AFCA's two search engine websites: see below n 30. This yielded 287 search results. We then used computational tools to automatically produce up to 330 variables for each decision. These tools included LawtoData, an AI-powered empirical legal research app, and a Python module for classifying judgments using AI: Ben Chen, 'LawtoData', *Streamlit* (Web Page) <https://lawtodata.app>, archived at <https://perma.cc/R9PA-GCBA>; Ben Chen, 'Langchainlaw', *GitHub* (Web Page) <https://github.com/nehcneb/langchainlaw>, archived at <https://perma.cc/Q572-CXNY>. The version of Langchainlaw we used is a modification of the original version developed by the Sydney Informatics Hub, a Core Research Facility of the University of Sydney: Xinwei Luo, Mike Lynch and Gordon McDonald, 'Langchainlaw', *Github* (Web Page) <https://github.com/Sydney-Informatics-Hub/langchainlaw>, archived at <https://perma.cc/YN3T-49WX>. Aiming to ensure data accuracy, we had a human research assistant manually check all AI-generated output against the original decisions. The research assistant corrected 12.5% of the AI-generated output and clarified another 3.2%. We then removed duplicative decisions and decisions which did not resolve a complaint about the distribution of death benefits. After this elimination process, 269 decisions remained. Our dataset and the Python codes used to generate, clean and analyse it are available upon request.

[30] AFCA has two search engines for their published decisions. One is for decisions published before 14 June 2024: 'Search Published Decisions', *Australian Financial Complaints Authority* (Web Page) <https://www.afca.org.au/what-to-expect/search-published-decisions>, archived at <https://perma.cc/BH5S-52G5>. The other is for decisions published from 14 June 2024: 'Search Published Decisions', *Australian Financial Complaints Authority* (Web Page) <https://www.afca.org.au/what-to-expect/search-published-decisions>, archived at <https://perma.cc/364S-UE8B>. On both search engines, we selected '[d]eath benefit distribution' under the '[i]ssue' menu.

[31] Barkley and Li (n 22) 209.

most relevantly, how the will would distribute the deceased estate, and whether it was given effect by the relevant superfund trustee and AFCA respectively. These variables are crucial for present purposes because, under current law, any charitable superannuation bequests must be made in a will.[32] As Part IV will elaborate, we make illustrative and inferential use of our dataset to support our normative arguments and reject the main counterarguments. Given we make no causative or predictive claims about how one variable affects another, we do not apply econometric or machine-learning techniques. Future research may apply such techniques to resolve disagreements between us and our critics.

Part II sets out the law governing the distribution of superannuation death benefits and the legal barriers for making charitable bequests with these death benefits. Part III examines the meagre size of charitable bequests in Australia, and makes the case for using death benefits to increase charitable giving. Part IV addresses and rejects the main objections to our proposed legislative reforms. In particular, we argue that our proposed reforms will not be cost-ineffective for Australian taxpayers, nor will family members of a deceased superfund member be significantly disadvantaged. Part V concludes.

II Legal Impediments to Making Charitable Bequests Using Superannuation Death Benefits

A federal legislative framework encompassing superannuation, corporations and taxation legislation primarily governs the distribution of superannuation death benefits. This legislative framework is augmented by the governing rules contained in the superfund's trust deed.[33] In this Part, we examine the current

32 See below Part II.

33 The general law of equity and trusts also governs superfund trustees to the extent consistent with statute: see generally Donald, 'Pension Trust' (n 21) 809–10; Pollard (n 21). In particular, general law permits courts to review trustees' 'identification and evaluation of factual matters' such as whether someone falls within the class of eligible persons for death benefits: see *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270 [29] (French CJ, Gummow, Heydon, Crennan and Bell JJ). Although less willingly, courts also may review trustees' discretionary distribution of death benefits within that class. For example, family trustees of SMSFs who decide to pay all death benefits to themselves may have breached their general law duty to give real and genuine consideration to the interests of other dependants and be removed by the court as a result: see, eg, *Wareham v Marsella* (2020) 61 VR 262, 264 [1]–[4], 289–90 [99], 291 [105] (Tate, McLeish and Hargrave JJA). We refrain from a close analysis of general law because its mild restrictions on trustee decision-making in relation to death benefits neither strengthen nor weaken our reform proposals.

legislative framework and the barriers to making charitable bequests using superannuation death benefits.

The key legislation governing superannuation death benefits is the *Superannuation Industry (Supervision) Act 1993* (Cth) (‘*SIS Act*’) and its associated regulations, the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (‘*SIS Regulations*’). These laws govern the receipt of death benefits from the balance remaining in a member’s account at death. Subject to two legislative constraints, trustees of superfunds generally have a discretion to distribute their deceased members’ superannuation balances.[34] Both of these constraints, as well as the tax legislation applying to superannuation bequests, have implications for making charitable bequests using superannuation death benefits.

A *Legislative Restriction on the Choice of Beneficiary for Death Benefits*

The first legislative constraint involves a restriction in the *SIS Regulations* on the choice of beneficiary for superannuation death benefits.[35] In general, death benefits can only be paid to the superfund member’s legal personal representative — who is the executor or administrator of their deceased estate — or a dependant.[36] Under the *SIS Act*, ‘dependant’ of a person includes ‘the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship’.[37] The legislative definition of ‘dependant’ is narrow and generally does not include parents, siblings or close friends, unless

[34] Both of these constraints apply to APRA-regulated superfunds, but only the first (see Part II(A)) applies to SMSFs: Australian Taxation Office, *Self Managed Superannuation Funds Determination* (SMSFD 2008/3, 17 December 2008) (‘*SMSF Determination*’), confirmed in *Hill v Zuda Pty Ltd* (2022) 275 CLR 24, 31–2 [14] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) (‘*Hill*’).

[35] *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.22 (‘*SIS Regulations*’).

[36] Ibid reg 6.22(2); *SIS Act* (n 19) s 10(1) (definition of ‘legal personal representative’). Under reg 6.22(3), death benefits can be paid to another individual if, after making reasonable enquiries, the trustee is not able to find either a legal personal representative or a dependant of the member.

[37] *SIS Act* (n 19) s 10 (definition of ‘dependant’). Under s 10(1) (definition of ‘spouse’ para (b)), a spouse includes someone who, although not legally married, lives with the member ‘on a genuine domestic basis in a relationship as a couple’. A child includes an adopted child, a stepchild, an ex-nuptial child, a child of the member’s spouse, and a child within the meaning of the *Family Law Act 1975* (Cth): *SIS Act* (n 19) s 10(1) (definition of ‘child’). Under the *SIS Act* (n 19) s 10A(1), an interdependency relationship is defined as a ‘close personal relationship’ between two persons who ‘live together’ where one or each of them provides the other with ‘financial support’ and ‘domestic support and personal care’.

they satisfy the conditions of an interdependency relationship. However, the definition has been extended in two ways. First, AFCA has interpreted the legislative definition to include 'any person who was financially dependent (whether wholly or partly) on the deceased member'.[38] Second, superfund trust deeds sometimes contain a broader definition of 'dependants'.[39] Our dataset of AFCA decisions shows that to the extent that a trust deed's definition differs from the definition in the *SIS Act*, such difference only accounts for AFCA's inclusion of financial dependants.[40]

Trustees of APRA-regulated superfunds are required to follow any binding death benefit nomination ('BDBN') made by a member in favour of their dependant or legal personal representative.[41] These statutory requirements do not apply to SMSFs unless adopted in the governing rules of the SMSF.[42] Similar to a will, BDBNs must meet statutory formalities of being in writing, signed and dated by the member in the presence of two witnesses who are 18 years or older and neither of whom is a designated beneficiary.[43] However, unlike a will, a BDBN is only valid for three years.[44] Therefore, a BDBN will lapse and become non-binding if it is not renewed every three years according to these formalities requirements. Death benefit nominations which do not comply with these requirements are at best non-binding and the superfund trustee must exercise their discretion in relation to the distribution of death benefits according to the fund's governing rules contained in the trust deed.[45] Interestingly, the *SIS Act*

[38] Australian Financial Complaints Authority, *The AFCA Approach to Superannuation Death Benefit Complaints* (Approach Document, October 2024) 3–4. The Federal Court has clarified that the legislative definition of a dependant 'is expressly inclusive not exclusive' and therefore does not exclude financial dependants: *Noel v Cook* [2004] FCA 479, [25]–[26] (Bennett J); *Tratter v Aware Super* [2023] FCA 491, [10] (Wheelahan J); *Tratter v Aware Super* [2024] FCAFC 36, [19] (Anderson J, O'Callaghan J agreeing at [1], McElwaine J agreeing at [95]).

[39] See, eg, *Trust Deed*, AustralianSuper (at 24 December 2021) sch 1 cl 2.2(22); *Consolidated Trust Deed*, UniSuper (at 2 December 2025) cl 1.1 (definition of 'dependants').

[40] See below n 59 and accompanying text.

[41] *SIS Act* (n 19) s 59(1A); *SIS Regulations* (n 35) reg 6.17A(4). This regulation providing for BDBNs was introduced in 1999. Previously, any expressed preference of a superfund member only ever operated as a guide to the trustee: Stephen Heath, 'Superannuation and Succession' (2020) 42(4) *The Bulletin* 32, 32.

[42] This requires the governing rules of the SMSF clearly providing that a nomination which binds the trustee must follow s 59(1A) of the *SIS Act*: see *SMSF Determination* (n 34) [15]–[16]; *Hill* (n 34) 31–2 [14] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

[43] *SIS Regulations* (n 35) reg 6.17A(6). See, eg, *Wills Act 1997* (Vic) s 7(1).

[44] *SIS Regulations* (n 35) reg 6.17A(7). Cf *Wills Act 1997* (Vic) pt 2 div 5.

[45] See *Wan v BT Funds Management Ltd* [2022] FCA 302, [26] (Anastassiou J) ('*Wan*').

allows trustees to consent to the exercise of their discretion by another person,[46] such as a member. Based on this, some trust deeds provide for 'non-lapsing' death benefit nominations, where the trustee consents to the directions in the death benefit nomination.[47]

The narrow class of permitted beneficiaries under the superannuation legislation disadvantages charities. Given charities are not dependants or individuals, they cannot be *directly* included in a BDBN. Instead, superfund members who wish to bequeath death benefits to a charity must do so indirectly: they must first nominate the legal personal representative of their deceased estate in a BDBN and then separately include the charity in their will. This indirect process requires the superfund trustee to distribute the death benefits to the member's deceased estate at death, which will only then pass on to the charity in accordance with the member's will.[48] As a result of this two-stage process, there is unnecessary cost and complexity involved in making a charitable superannuation bequest.[49] In its recent inquiry into philanthropic giving, the Productivity Commission acknowledged that there is 'scope to make the process of donating superannuation death benefits to charity less cumbersome'.[50]

B *AFCA's Disregard for Testamentary Wishes Expressed in a Will*

The second legislative constraint — set out in the *Corporations Act 2001* (Cth) — provides for AFCA to make determinations in relation to superannuation complaints against APRA-regulated superfund trustees.[51] Under this legislation, superfund trustees are required to make decisions in relation to the

46 *SIS Act* (n 19) s 59(1)(a).

47 For a deed permitting non-lapsing nominations to comply with s 59(1) of the *SIS Act* (n 19), the trustee should be able to 'withhold its consent to a nomination.' To that extent it 'maintains its discretion': *Case No 752151* (Australian Financial Complaints Authority, 31 March 2022) 5. See also *Case No 649701* (Australian Financial Complaints Authority, 11 May 2021) 5–6.

48 *Future Foundations for Giving* (n 4) 303–4.

49 Philanthropy Australia has also made this point: *Blueprint to Grow Structured Giving* (n 6) 17.

50 *Future Foundations for Giving* (n 4) 267.

51 *Corporations Act 2001* (Cth) pt 7.10A div 3 ('*Corporations Act*'). AFCA started receiving superannuation complaints on 1 November 2018, replacing the Superannuation Complaints Tribunal, which ceased operations on 31 December 2020: Treasury (Cth), *Review of the Australian Financial Complaints Authority* (Report, August 2021) 2–3 [1.10]–[1.15]. For the legislative history of pt 7.10A and the establishment of the AFCA scheme, see *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97, 103–4 [13]–[17] (Moshinsky, Bromwich and Derrington JJ) ('*QSuper*').

payment of a death benefit which are 'fair and reasonable in all the circumstances'.[52] AFCA may vary or set aside a trustee's decision if the decision is 'unfair or unreasonable' in its operation in relation to the complainant or any other person joined as a party to the complaint.[53] Such AFCA review is de novo;[54] it is not essential to find flaw in the trustee's decision-making process.[55] The Federal Court reviews AFCA decisions for whether 'AFCA erred as a matter of law in determining that the decision of the trustee was fair and reasonable'.[56] Moreover, in part because AFCA rules form a contract between itself, its member firms and complainants, state courts can also review AFCA decisions to uphold that contract.[57]

AFCA review of a trustee's distribution of death benefits is limited if a valid BDBN is in place because regulated superfund trustees are required by law to follow the BDBN.[58] In our dataset of AFCA decisions, more than 80% concerned complaints against a trustee's decision based on a non-binding nomination or no nomination.[59] The remaining 20% largely concerned either an invalid BDBN or a dispute about its validity; for example, whether the BDBN was properly witnessed,[60] or whether a nominee was a dependant.[61]

Empirical analysis shows that in reviewing trustees' distribution of death benefits, AFCA almost always disregards deceased members' testamentary wishes expressed in a will. The Federal Court has held that regulated fund trustees' discretion to distribute death benefits is broad in scope and must take into account the 'aggregate provision' made by a deceased member from the 'whole

52 *Corporations Act* (n 51) ss 1055(3), (5).

53 Ibid ss 1055(4)–(6); *QSuper* (n 51) 113 [64]–[65] (Moshinsky, Bromwich and Derrington JJ).

54 *Rushton v Commonwealth Superannuation Corporation (No 3)* [2021] FCA 358, [50] (Rares J), citing *Mercer Superannuation (Australia) Ltd v Billinghurst* (2017) 255 FCR 144, 155 [32] (Flick and Kerr JJ).

55 *Corporations Act* (n 51) s 1055; *QSuper* (n 51) 113 [64]–[65] (Moshinsky, Bromwich and Derrington JJ).

56 *Madden v Australian Financial Complaints Authority Ltd* [2025] FCA 196, [43] (Coller J) (emphasis omitted), discussing pursuant to the *Corporations Act* (n 51) s 1057.

57 *Notesco Pty Ltd v Australian Financial Complaints Authority Ltd* (2022) 365 FLR 163, 168 [10], 171 [21] (Rees J).

58 See above Part II(A).

59 Out of the 269 decisions in our AFCA dataset, 115 involved non-binding nominations only (115 ÷ 269 = 42.8%), while 101 involved no nomination (101 ÷ 269 = 37.5%).

60 *Case No 750261* (Australian Financial Complaints Authority, 28 February 2022) 5.

61 See, eg, *Case No 769630* (Australian Financial Complaints Authority, 26 April 2022) 2–9.

of [their] assets'.[62] This includes having regard to testamentary wishes manifested in any will and any non-binding death benefit nomination.[63] However, out of the 269 decisions in our AFCA dataset, 116 discussed the deceased member's will, and AFCA only distributed death benefits according to the will in 13 decisions (or 11.2%). This is because AFCA prioritises financial and other dependants over legal personal representatives, as Barkley and Li have independently verified using machine learning techniques.[64]

AFCA's consistent disregard for testamentary wishes expressed in a will disincentivises members from making a charitable superannuation bequest. As mentioned above, given a charity cannot be included in a death benefit nomination, members must include a charitable bequest from their death benefits in their will. Yet, unless the death benefit is actually paid to the member's legal personal representative, the relevant charity will not receive the death benefit. For example, one case in our AFCA dataset included a bequest in a will to a charity from superannuation death benefits. Under this will, income from the death benefit was to be enjoyed by a daughter of the deceased member during her lifetime, and a charity would receive the death benefit upon the daughter's death.[65] The superfund trustee paid the death benefit to the legal personal representative, who was required to follow the will. However, AFCA overruled the trustee and paid the entire death benefit to the daughter instead. In so ruling, AFCA explicitly considered the charitable bequest as disadvantaging the deceased member's adult children. This was notwithstanding the fact that these children were estranged from the member, were not financially dependent on the member, and had no realistic expectation of receiving any inheritance from the member.[66]

C *Taxation of Charitable Superannuation Bequests through a Deceased Estate*

Tax legislation also affects the distribution of superannuation death benefits and disincentivises charitable bequests using superannuation death benefits.

[62] *Wan* (n 45) [112], [116]–[119] (Anastassiou J). On appeal, the Full Court approved of Anastassiou J's approach: *Wan v BT Funds Management Ltd* [2022] FCAFC 189, [57] (McEvoy J, Markovic J agreeing at [1], McElwaine J agreeing at [2]).

[63] *Wan* (n 45) [116] (Anastassiou J).

[64] Barkley and Li (n 22) 224–5.

[65] See, eg, *Case No 784531* (Australian Financial Complaints Authority, 18 March 2022) 2–3 ('*Case No 784531*').

[66] Ibid 3–5.

Under the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*'), superannuation receives a range of tax concessions throughout its lifecycle.[67] Notably, subject to a cap, compulsory and voluntary contributions are generally taxed at a concessional rate of 15%, which is lower than the marginal rate for most individuals.[68] Moreover, earnings on superannuation assets in superfunds are taxed at 15% in the accumulation phase,[69] and are 'tax free' to the member in the retirement phase.[70] However, tax concessions may end when the member dies.

Division 302 of the *ITAA 1997* provides that a death benefit paid to a 'dependant' as defined in the *ITAA 1997* is 'tax free'.[71] The definition of a 'dependant' in the *ITAA 1997* includes the deceased person's spouse (using the same definition as in the *SIS Act*) and also a former spouse; a child 'aged less than 18'; any other person whom the deceased person had an 'interdependency relationship … just before he or she died' (using the same definition as in the *SIS Act*); and 'any other person who was a dependant of the deceased just before he or

[67] Part IV(A) will discuss other relevant superannuation tax concessions.

[68] *Income Tax Assessment Act 1997* (Cth) ss 280-10, 280-15 ('*ITAA 1997*'). See below nn 125–7 and accompanying text.

[69] *ITAA 1997* (n 68) s 280-20. These funds also benefit from imputation credits and 33.3% capital gains tax discount for assets held more than 12 months: 'How SMSFs Are Taxed', *Australian Taxation Office* (Web Page, 2 April 2025) <https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-administration-and-reporting/how-smsfs-are-taxed>, archived at <https://perma.cc/ZN2N-9T4D>; Association of Superannuation Funds of Australia, *Dividend Imputation: Its Rationale and Its Impact on Superannuation Outcomes* (Report, August 2015) 8 <https://www.superannuation.asn.au/report/dividend-imputation-its-rationale-and-its-impact-on-superannuation-outcomes/>, archived at <https://perma.cc/JC3U-4FQZ>.

[70] *ITAA 1997* (n 68) s 301-10, which provides that all superannuation benefits will be tax-free when paid to a member 60 years or over. See also *Retirement Income Review* (n 10) 81.

[71] *ITAA 1997* (n 68) s 302-60 (for lump sums).

she died'.[72] However, death benefits distributed to beneficiaries who are not 'dependants' under the *ITAA 1997* are subject to a 15% tax.[73]

Given that a charity is not a 'dependant' under the *ITAA 1997*, any death benefits distributed to a charity through a deceased estate will be subject to the 15% tax. As a result, making a superannuation bequest to charity is more costly than making a superannuation bequest to a 'dependant'. This tax may serve as a further disincentive to donating death benefits to charity.[74] By comparison, Australian tax law generally encourages lifetime charitable giving through tax incentives,[75] and does not tax charitable bequests from non-superannuation assets in a deceased estate.[76] With this in mind, a superfund member who wishes to donate some of their superannuation balance to charity can sometimes avoid the 15% tax by withdrawing from their superfund to make the donation during their lifetime.[77]

However, a charitable bequest offers the member more financial security than a lifetime charitable donation. This is due to the nature of testamentary instruments. A will, death benefit nomination or another testamentary instrument is freely revocable up until the donor's moment of death.[78] During their lifetime, the donor has substantial freedom to draw upon the assets covered by the instrument to meet health, long-term care or other expenses. If the donor lives longer than expected and needs to draw upon their assets, they do so at the expense of those who will inherit from them. In other words, a

[72] Ibid s 302-195(1). The last category of dependant is not defined in the legislation, but private rulings by the Commissioner clarify that it includes a person who is considered a dependant within the ordinary meaning of the term as established in the case law: see, eg, Australian Taxation Office, *Superannuation Death Benefits Dependent* (8 December 2023) <https://www.ato.gov.au/law/view/view.htm?docid=EV/1052187560814&PiT=99991231235958>, archived at <https://perma.cc/UE7C-K8Q4>. The definition of dependency was addressed in *Kauri Timber Co (Tas) Pty Ltd v Reeman* (1973) 128 CLR 177, 179 (Barwick CJ), 182 (McTiernan J), 187–8 (Gibbs J), 193 (Stephen J); *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83, [16]–[18] (Tamberlin, Emmett and Middleton JJ).

[73] *ITAA 1997* (n 68) s 302-145(2). This refers to the taxable component of a death benefit. The 'element *untaxed* in the fund' under s 302-145(3), which can lead to an increased tax liability of 30%, only arises if deductions were claimed in respect of premiums for a policy of life insurance: at s 307-290(1) (emphasis added).

[74] *Blueprint to Grow Structured Giving* (n 6) 17.

[75] See below nn 97–102 and accompanying text.

[76] See below n 103 and accompanying text.

[77] See *Future Foundations for Giving* (n 4) 310.

[78] See Alexandra Braun, 'Exploring the Boundaries of Succession Law' (Research Paper No 2018/15, School of Law, University of Edinburgh, 2018) 8.

bequest transfers longevity risk — the risk of the donor living longer than expected — to those who inherit from the donor. By comparison, the assets covered by a lifetime donation are beyond the reach of the donor once made; the donor bears the longevity risk.

D *Proposed Legislative Reforms*

This Part has shown that the existing legislative framework creates legal impediments to promoting charitable bequests from superannuation death benefits. Restrictions on a member's choice of beneficiary mean that charities are excluded from being directly included in death benefit nominations. This legal impediment is exacerbated for APRA-regulated superfunds by AFCA's consistent disregard for testamentary wishes expressed in a will. Moreover, in the unlikely event that a charity is left a superannuation bequest through a member's will, as a non-dependant under the tax law, any death benefits paid will still be subject to the 15% tax. These legal impediments are likely to disincentivise charitable superannuation bequests.

To address these legal impediments, we propose the following legislative reforms. First, the categories of superannuation death benefit beneficiaries under the *SIS Act* should be expanded to include charities. This will not only provide a simplified process of directly including charities in death benefit nominations, but will also allow APRA-regulated superfund members to circumvent AFCA by making a BDBN if they so desire. Second, the categories in the *ITAA 1997* of those who can receive superannuation death benefits 'tax free' should be expanded to include charities.

In the next Part, we examine whether these proposed legislative reforms to superannuation inheritance law can be justified on normative and empirical grounds.

III Facilitating Charitable Bequests Using Superannuation Death Benefits

From the outset it is important to underscore that charity is favoured under the law, with special privileges at general law and under statute accorded to objects directed to a charitable end.[79] In doing so, the law recognises that charities supply public goods and services which may not be provided in sufficient quantity

[79] For a discussion of these privileges, see GE Dal Pont, *Law of Charity* (LexisNexis, 3rd ed, 2021) 123–53.

by the private marketplace or by government.[80] This is embodied in the legal definition of charities as not-for-profit entities with charitable purposes that are for the public benefit, such as advancing health, education and social welfare.[81] By attracting philanthropic funding, charities are therefore able to provide goods and services for the benefit of the community — goods and services which would otherwise be undersupplied. This explains why the Australian Government is seeking to double philanthropy by 2030.[82]

Existing data shows charitable bequests in Australia are meagre, both as a source of donations relative to other forms of giving and as a proportion of overall inheritances. This provides an opportunity to increase charitable bequests, with superannuation death benefits having been identified by the Productivity Commission as a key means of promoting charitable giving through bequests.[83] However, as discussed in Part II above, we have found that there are strong legal impediments to doing so. In this Part, we offer justifications for removing these impediments, including on normative grounds of promoting both testamentary freedom and intergenerational and intragenerational equity.

A *Charitable Bequests in Australia Are Meagre*

Charitable bequests in Australia are small relative to lifetime charitable giving. The Australian Charities and Not-for-profits Commission ('ACNC') reports that Australians donated approximately $18.9 billion to registered charities in 2023.[84] Data on how much of those donations comprise charitable bequests is

80 See generally Burton A Weisbrod, 'Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy', in Edmund S Phelps (ed), *Altruism, Morality and Economic Theory* (Russell Sage Foundation, 1975) 171; Henry Hansmann, 'Economic Theories of Nonprofit Organization' in Walter W Powell (ed), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 1987) 27.

81 This definition derives from the seminal English case, *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten) and is embodied in the *Charities Act 2013* (Cth) s 5 (definition of 'charity'). The public benefit requirement is contained in s 6, while s 12(1) sets out a non-exhaustive list of 12 charitable purposes.

82 'Labor Media Release' (n 1).

83 *Future Foundations for Giving* (n 4) 300–1.

84 This was an increase of $5 billion from the previous year due to a $4.9 billion donation to the Minderoo Foundation group, the largest donation to a single charity ever reported by the ACNC: Australian Charities and Not-for-profits Commission, *Australian Charities Report: 11th Edition* (Report, 4 June 2025) 6, 31 <https://www.acnc.gov.au/tools/reports/australian-

difficult to obtain, in part because the ACNC does not require charities to separately report bequests and lifetime donations.[85] However, citing ACNC data, the Productivity Commission estimated that bequests comprised 4% of all donations to registered charities.[86] Providing a higher figure, JBWere estimated that charitable bequests 'as a proportion of all philanthropy' were 10%.[87] Either estimate reveals a significant difference in lifetime and testamentary charitable giving.

Charitable bequests in Australia are also small relative to overall inheritances. Most Australians leave nothing to charity when they die. The Productivity Commission estimated that 'about 2 per cent of estates are left to charity'.[88] JBWere estimated that the overall proportion of inheritances left to charity was 1%,[89] with 6.5% of wills including a charity.[90] These estimates are low in comparison to the United States and the United Kingdom. In the United States, the proportion of inheritances left to charity is 4.4%, with 10% of wills including a charity, while in the United Kingdom, the proportion of overall inheritances left to charity is 3.7%, with 13.7% of wills including a charity.[91] Yet, even the higher proportion of inheritances left to charity in these jurisdictions is considered meagre. As United States scholar Professor Lawrence Friedman explains:

> [M]ost people leave nothing to charity; their money goes at death to members of their families. Billionaires may be different; but the percentage of ordinary

charities-report-11th-edition>, archived at <https://perma.cc/25QX-LMJP> ('*Australian Charities Report*').

85 Instead, both lifetime charitable donations and charitable bequests are presented as 'revenue from donations and bequests' in the ACNC's annual *Australian Charities Report*: see, eg, ibid 29–31, 34.

86 This figure excludes distributions from charitable trusts established in a will: *Future Foundations for Giving* (n 4) 83–4.

87 *Bequest Report* (n 3) 20.

88 'Wealth Transfers' (n 2) 4, 71, 97, citing Christopher Baker, 'Encouraging Charitable Bequests by Australians' (Research Report, Asia-Pacific Centre for Social Investment and Philanthropy, Swinburne University of Technology, February 2014).

89 *Bequest Report* (n 3) 13.

90 Ibid 20.

91 Ibid, citing Giving USA, *Giving USA 2024: The Annual Report on Philanthropy for the Year 2023* (Report, 2024); Smee & Ford, *Legacy Trends Report 2024* (Annual Report, 2024).

> people, even ordinary rich people, who leave money to charity is quite small. This is a consistent finding of all of the studies of testamentary behavior.[92]

That family members are prioritised as testamentary beneficiaries partially explains the low proportion of charitable bequests. Treasury data on testamentary behaviour shows that 40% of Australians die while part of a couple, with 95% of these people leaving their wealth to their surviving partner, 4% to the next generation, and less than 0.5% to others.[93] For the 60% of Australians who die single, 85% of their wealth is left to the next generation, with the remaining 15% to others.[94]

Individual motives for charitable giving also partially explain the low proportion of charitable bequests. Economists have found that charitable motives tend to be intangible, altruistic and egoistic; such motives include the 'warm glow' donors experience from making a gift and the elevated social status that prominent gifts can bring.[95] The experience of a 'warm glow' or heightened social prestige may be more pronounced during the donor's lifetime than at death, which may reduce the impact of this motive for charitable bequests. However, both a 'warm glow' and heightened social prestige can still be experienced in the lifetime process of estate planning, particularly when making large bequests endowed in the donor's name.[96]

A more tangible motive for charitable giving is the tax incentives provided by government.[97] The special tax treatment accorded to charities is a direct

92 Lawrence M Friedman, *Dead Hands: A Social History of Wills, Trusts and Inheritance Law* (Stanford University Press, 2009) 140. See also Anthony B Atkinson, 'Wealth and Inheritance in Britain from 1896 to the Present' (2018) 16(2) *Journal of Economic Inequality* 137, 143; TP Schwartz, 'Testamentary Behavior: Issues and Evidence about Individuality, Altruism and Social Influence' (1993) 34(2) *Sociological Quarterly* 337, 345.

93 'Wealth Transfers' (n 2) 25.

94 Ibid.

95 James Andreoni, 'Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving' (1990) 100(401) *Economic Journal* 464, 464, quoting Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965) 60; Gary S Becker, 'A Theory of Social Interactions' (1974) 82(6) *Journal of Political Economy* 1063, 1083. See also William T Harbaugh, 'What Do Donations Buy? A Model of Philanthropy Based on Prestige and Warm Glow' (1998) 67(2) *Journal of Public Economics* 269, 283.

96 See Adam J Hirsch, 'Beyond Privity of Blood: Intestacy and Charity' (2025) 76(2) *UC Law Journal* 353, 360–2.

97 See John Simon, Harvey Dale and Laura Chisolm, 'The Federal Tax Treatment of Charitable Organizations' in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 267, 272; Joseph J Cordes, 'Re-Thinking

result of their favoured status under the law. With tax privileges comes a risk of schemes involving entities exploiting charitable structures,[98] although the ATO states that 'the vast majority of not-for-profit … organisations operate with integrity and serve the public good.'[99] In Australia, tax concessions for charities include income tax exemption, fringe benefit tax exemptions and rebates, goods and services tax concessions, as well as land tax, stamp duty, and payroll tax exemptions.[100] Importantly, to incentivise charitable giving, charities that obtain Deductible Gift Recipient status are able to provide their donors with an income tax deduction for any gifts above $2.[101] However, under the *ITAA 1997* testamentary gifts are not tax deductible.[102] Consequently, a tax incentive for charitable giving only applies to gifts made by the donor while they are alive; there is no tax incentive to include a charitable bequest in an estate. At the same time, with no estate or inheritance taxes in Australia, all inheritances are tax-free.[103] This is unusual when compared to other countries in the Organisation for Economic Co-operation and Development ('OECD').[104] The result is that while there are no tax incentives to encourage charitable bequests, there are also no disincentives in the tax law to discourage such bequests, other than the tax on superannuation bequests.

the Deduction for Charitable Contributions: Evaluating the Effects of Deficit-Reduction Proposals' (2011) 64(4) *National Tax Journal* 1001, 1012.

98 See, eg, Australian Taxation Office, *Purported Tax-Exempt Non-Profit 'Foundations' Used to Evade or Avoid Taxation Obligations* (TA 2016/5, 29 April 2016) <https://www.ato.gov.au/law/view/document?DocID=TPA%2FTA20165%2FNAT%2FATO%2F00001&PiT=99991231235958&document=document>, archived at <https://perma.cc/YJB3-HJDY>.

99 'Safeguarding Not-for-Profits from Dodgy Schemes', *Australian Taxation Office* (Web Page, 28 February 2025) <https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/safeguarding-not-for-profits-from-dodgy-schemes>, archived at <https://perma.cc/RQL2-KFW7>.

100 See generally Ann O'Connell, *Taxation of Charities and Not-for-Profits* (LexisNexis, 2021) 21, 24.

101 *ITAA 1997* (n 68) ss 30-15, 30-227.

102 Ibid s 30-15(2).

103 Inheritance taxes were abolished at the Commonwealth level in 1979 and the last state tax was abolished in 1982: 'Wealth Transfers' (n 2) 13, citing Willard H Pedrick, 'To Die Down Under: Abolition of Death and Gift Duties in Australia' (1982) 14(4) *University of Western Australia Law Review* 438, 443.

104 See OECD, *Inheritance Taxation in OECD Countries* (Report No 28, 2021) 73–5 <https://doi.org/10.1787/e2879a7d-en>, archived at <https://perma.cc/5Z2C-G2Q8>.

Superannuation death benefits therefore represent a vital initiative to promote charitable bequests. However, this initiative is stymied by the legal barriers discussed in Part II above.

B *Superannuation Bequests Made Directly to Charities Promote Testamentary Freedom*

Australian inheritance law ordinarily gives effect to an individual's testamentary choices. This is explained in part because individuals typically know better than others about the particular circumstances of their own families and other interdependent relationships.[105] Individuals also tend to know better than others about their own altruistic motives and good behaviours towards them.[106] Australian courts have consistently reaffirmed the significance of testamentary freedom as 'a prominent feature of the Australian legal system'.[107] At the same time, testamentary freedom under Australian inheritance law is qualified by state-based family provision legislation, which enables individuals to challenge the arrangements made by the deceased and empowers a court to override the effect of a will (or intestacy rules) in order to provide for dependants and other family members who have not received adequate provision from the relevant deceased estate.[108] Family provision law therefore seeks to provide protection for dependants and other family members who have not received adequate financial provision from the deceased. The categories of claimants who may make a family provision claim are broad and have expanded over the years, particularly as the meaning of 'family' has undergone significant change.[109]

105 *Banks v Goodfellow* (1870) LR 5 QB 549, 563–5 (Cockburn CJ for the Court).

106 Ibid.

107 *Collins v Mutton* [2012] NSWSC 548, [91] (Hallen AsJ). See also *Barns v Barns* (2003) 214 CLR 169, 216–17 [40] (Callinan J). For other examples, see Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis, 6th ed, 2024) 645–6.

108 These provisions are contained in the *Family Provision Act 1969* (ACT), *Succession Act 2006* (NSW) ch 3, *Family Provision Act 1970* (NT), *Succession Act 1981* (Qld) pt 4, *Succession Act 2023* (SA) pt 6, *Testators Family Maintenance Act 1912* (Tas), *Administration and Probate Act 1958* (Vic) pt IV, and *Family Provision Act 1972* (WA).

109 Rosalind Croucher, 'Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65: Orthodoxy or Aberration?' (2005) 27(2) *Sydney Law Review* 263, 285–7; Frances M Hannah and Myles McGregor-Lowndes, 'From Testamentary Freedom to Testamentary Duty: Finding the Balance' (Working Paper No 42, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, October 2008) 1, 3, 14.

While family provision legislation heavily qualifies testamentary freedom under Australia's ordinary inheritance law, our superannuation inheritance law goes even further in impeding our testamentary freedom. When making a will, we have the freedom to choose our beneficiaries without restrictions. If we want to leave a bequest to a friend or a charity, we are free to do so. However, as discussed in Part II, when making a superannuation death benefit nomination, we can only choose our dependants (as defined in the superfund trust deed) and our legal personal representative. Bequests of death benefits to non-dependants, such as a friend or a charity, must be made indirectly through the deceased estate. If made in a non-binding nomination, then these bequests are exposed to AFCA review of a trustee's distribution of death benefits, which consistently disregards deceased members' testamentary wishes expressed in a will.

Allowing direct inclusion of charities in death benefit nominations would therefore lessen the additional legislative restriction on our freedom to choose testamentary beneficiaries that exists under Australia's current superannuation inheritance law.

C *Charitable Bequests Promote Intergenerational and Intragenerational Equity*

The value of inheritances in Australia that were transferred intergenerationally was approximately $52 billion in 2018, up from $24 billion in 2002.[110] Given that most Australians die with the majority of the wealth they had when they retired,[111] wealthier Australian families will disproportionately benefit from the large intergenerational wealth transfer.[112] This inequity is particularly pronounced with respect to superannuation inheritances. High net worth individuals generally have larger superannuation balances, which result in their dependants receiving greater death benefits.[113] Indeed, some commentators have described superannuation as a 'taxpayer-funded inheritance scheme'.[114] As a

[110] 'Wealth Transfers' (n 2) 25.

[111] *Retirement Income Review* (n 10) 51, 369.

[112] 'Rising Inequality' (n 8) 86; *Retirement Income Review* (n 10) 51, 370.

[113] See Stewart (n 25) 472; Richard Denniss and David Richardson, 'Self-Funded or State-Funded Retirees? The Cost of Super Tax Concessions' (Research Paper, Australia Institute, February 2023) 1; *Retirement Income Review* (n 10) 369–71; 'Wealth Transfers' (n 2) 43.

[114] John Daley, Brendan Coates and William Young, 'A Better Super System: Assessing the 2016 Tax Reforms' (Working Paper No 2016-1, Grattan Institute, September 2016) 11–12 <https://grattan.edu.au/wp-content/uploads/2016/09/876-A-better-super-system.pdf>, archived at <https://perma.cc/ZAB8-FN8X>. But see Kingston and Thorp (n 23) 146 n 12.

result, despite the Australian Government's stated policy that superannuation should operate in an equitable way,[115] the distribution of superannuation death benefits is arguably exacerbating inequality in Australia.

Removing the legal impediments to charitable superannuation bequests identified in Part II above will help to ameliorate this problem. In a nationwide study of Australian probate files, Dr Christopher Baker found that wealthy individuals are more likely to make charitable bequests through their estates, and that the proportion of an estate distributed as charitable bequests increases with the value of the estate.[116] His data shows that individuals with estates valued at more than $2 million are three times more likely to make a charitable bequest (with an 18% participation rate), compared to estates valued at less than $0.5 million (with a 6% participation rate).[117] In addition, the average proportion of the final estate gifted to charity is almost three times higher for estates valued at more than $2 million (4.5%), compared to estates valued at less than $0.5 million (1.6%).[118] Significantly, Baker's findings also reveal that bequests to charity are overwhelmingly made to charities providing social services, with human welfare organisations representing the largest category of beneficiaries of charitable bequests; these organisations represent approximately 60% of charitable organisations included in a will, and receive 56% of all charitable dollars bequeathed.[119] In contrast, charitable organisations focusing on the arts, which generally do not target disadvantaged members of society to the same extent as human welfare organisations, represent less than 4% of charitable organisations included in a will, and less than 4% of all charitable dollars bequeathed.[120]

Baker's findings support our proposed reforms to increase charitable superannuation bequests. His findings suggest that charitable bequests in general tend to ameliorate wealth inequality. Wealthier individuals are more likely to make charitable bequests (with a greater proportion of their estates going to charity), holding all other factors constant. Those bequests are more likely to be donated to human welfare organisations, which tend to benefit less wealthy

115 Treasury (Cth), *Legislating the Objective of Superannuation* (Consultation Paper, 28 September 2023) 8 <https://treasury.gov.au/sites/default/files/2023-02/c2023-361383.pdf>, archived at <https://perma.cc/AB9T-BX93>.

116 Baker (n 88) 45.

117 Ibid.

118 Ibid.

119 Ibid 52.

120 Ibid.

members of society. By this reasoning, wealthier individuals are more willing to bequeath superannuation death benefits to charity, and less wealthy individuals tend to be the ultimate beneficiaries of these bequests.

IV Objections to Proposals to Promote Charitable Superannuation Bequests

Our two proposed legislative reforms to superannuation inheritance law — namely, allowing direct inclusion of charities as beneficiaries in death benefit nominations and removing the tax on superannuation charitable bequests — are not without objection. In its inquiry into philanthropy, the Productivity Commission raises objections to these proposed reforms.[121] This Part addresses, and ultimately rejects, the main objections.

A *The Relative Tax Benefit of Superannuation Bequests*

The Productivity Commission finds 'no case for reducing superannuation taxes for bequests' to charities.[122] Their view is principally premised on two claims. First, '[t]he tax system is not neutral in death and provides a larger tax benefit for the superannuation component of an estate'. Second, 'adding further concessions at the time of death would be a relatively costly way for the Australian Government to incentivise philanthropic giving'.[123] We challenge their first claim in this section and their second claim in the next section.

As a savings vehicle, it is clear that superannuation enjoys various tax advantages over its life cycle. In particular, the Productivity Commission highlights the 'reduced tax rate of 15% (plus 2% Medicare levy if applicable) on concessional (that is, 'before tax') contributions and superannuation investment income, and tax-free withdrawals if the superannuant is aged 60 or older'.[124] There is a cap on such concessional contributions ($30,000 per year at the time of writing),[125] and investment income for superannuation balances above $3

121 *Future Foundations for Giving* (n 4) 301–11.

122 Ibid 311.

123 Ibid. See also at 305–7.

124 Ibid 305.

125 'Concessional Contributions Cap', *Australian Taxation Office* (Web Page, 24 July 2024) <https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/growing-and-keeping-track-of-your-super/caps-limits-and-tax-on-super-contributions/concessional-contributions-cap>, archived at <https://perma.cc/K9L8-R6UG>.

million is now scheduled to be taxed at 30%.[126] Nonetheless, for the majority of income earners, the tax rates on concessional contributions and investment income are lower than their marginal tax rate.[127] An implication is that for the majority of income earners, putting their savings in superannuation attracts less tax liability than putting their savings in many other vehicles.[128] When an income earner dies, any bequests to a charity or others must come from their assets at death, which include excess superannuation. For this reason, the Productivity Commission claims that 'giving to a charity from one's superannuation on death has a bigger tax benefit than giving from the non-super component of one's estate'.[129]

Yet, the Productivity Commission fails to account for the most valuable asset in a typical deceased estate: the deceased's home.[130] The home generally grows in value over time, may be used to support retirement living (for example, through downsizing), and may be passed on to others as inheritance. Like superannuation, the home also enjoys various tax benefits; some benefits apply to the home but not to superannuation, and vice versa. For example, profits made from the sale of the home are generally exempted from capital gains tax if sold within two years of death or if the dwelling becomes the beneficiary's main residence,[131] while tax applies to superannuation in the accumulation

126 'Better Targeted Superannuation Concessions', *Australian Taxation Office* (Web Page, 24 March 2026) <https://www.ato.gov.au/about-ato/new-legislation/in-detail/superannuation/better-targeted-superannuation-concessions>, archived at <https://perma.cc/7PMA-7V3W>.

127 According to the latest statistic from the Australian Bureau of Statistics, in 2022–23, the median personal income was $58,216: Australian Bureau of Statistics, *Personal Income in Australia* (Catalogue No 6524.0.55.002, 16 January 2026). The marginal tax rate for the median income earner was 32.5% in 2021–22 and has now been reduced to 30%: 'Tax Rates: Australian Resident', *Australian Taxation Office* (Web Page, 18 June 2025) <https://www.ato.gov.au/tax-rates-and-codes/tax-rates-australian-residents#ato-Australianresidenttaxrates2020to2025>, archived at <https://perma.cc/KEW3-DTPZ>.

128 John Daley, Brendan Coates and Danielle Wood, Grattan Institute, *Super Tax Targeting* (Report No 2015-11, November 2015) 18 ('*Super Tax Targeting*').

129 *Future Foundations for Giving* (n 4) 307.

130 In 2015–16, owner-occupied housing accounted for 39% of total household wealth in Australia while superannuation accounted for 21%: 'Rising Inequality' (n 8) 78.

131 *ITAA 1997* (n 68) s 118-195; 'Inherited Property and CGT', *Australian Taxation Office* (Web Page, 23 June 2025) <https://www.ato.gov.au/individuals-and-families/investments-and-assets/capital-gains-tax/inherited-assets-and-capital-gains-tax/inherited-property-and-cgt>, archived at <https://perma.cc/W9T2-5573>.

phase.[132] Living in the home — a form of consumption — is also not taxed.[133] Moreover, as Professors Geoffrey Kingston and Susan Thorp note, critics of superannuation tax concessions often ignore the fact that 'the traditional retirement plan for most Australians [is] an owner-occupied home plus eligibility for the Age Pension'.[134] A retiree's eligibility for the Age Pension depends on their satisfaction of an asset test and an income test. The value of their home generally does not affect either test,[135] while the value of, and income from, their superannuation affects both.[136] Although income from the Age Pension is taxable,[137] such income increases over time and does not reduce the value of the home. By comparison, withdrawing from one's superannuation balance reduces its value. Overall, giving to a charity from the home component of a deceased estate also has tax benefits, just like giving to a charity from the superannuation component.

We therefore reject the Productivity Commission's claim that charitable bequests from the superannuation component of a deceased estate have 'a bigger tax benefit' than other components.[138] The home is typically the largest component of a deceased estate, and also enjoys tax benefits. A fair comparison of how different components of a deceased estate are taxed overall cannot be done by illuminating some taxes while ignoring others.[139]

132 *Super Tax Targeting* (n 128) 14.

133 'Eligibility for Main Residence Exemption', *Australian Taxation Office* (Web Page, 23 June 2025) <https://www.ato.gov.au/individuals-and-families/investments-and-assets/capital-gains-tax/property-and-capital-gains-tax/your-main-residence-home/eligibility-for-main-residence-exemption>, archived at <https://perma.cc/59N2-HXQG>.

134 Kingston and Thorp (n 23) 146 n 12, discussing Daley, Coates and Young (n 114).

135 'Asset Types', *Services Australia* (Web Page, 19 March 2026) <https://www.servicesaustralia.gov.au/asset-types?context=22526#realestate>, archived at <https://perma.cc/N4NY-FL8M> ('Asset Types').

136 'Income Test', *Services Australia* (Web Page, 20 March 2026) <https://www.servicesaustralia.gov.au/income-test-for-age-pension?context=22526>, archived at <https://perma.cc/MMQ9-6L9N>; 'Asset Types' (n 135).

137 'Government Payments and Allowances', *Australian Taxation Office* (Web Page, 16 June 2025) <https://www.ato.gov.au/individuals-and-families/income-deductions-offsets-and-records/income-you-must-declare/government-payments-and-allowances>, archived at <https://perma.cc/6JC6-P5ET>.

138 *Future Foundations for Giving* (n 4) 307.

139 To our best knowledge, *Super Tax Targeting* (n 128) provides the most cited comparative analysis of the overall taxation of superannuation, own home, and some other savings vehicles. That analysis suggests that the home is taxed more than the concessional component of superannuation and less than the non-concessional component. However, it '[i]gnores impacts on

B *Revenue Forgone for the Australian Government*

The Productivity Commission also maintains that 'adding further concessions at the time of death would be a relatively costly way for the Australian Government to incentivise philanthropic giving'.[140] Their resistance to removing the superannuation tax on charitable bequests is based on an intuitive analysis of a theoretical economic model capturing 'any increase in giving per dollar of revenue forgone' for the Australian Government.[141] We argue that their own methodology does not justify their conclusion; increases in charitable bequests incentivised by dropping the superannuation tax may well outweigh the revenue forgone.[142] By so doing, we are agnostic on their methodology and focus on addressing deficiencies in their application of that methodology.

As the following will explain with greater specificity, the Productivity Commission's methodology makes use of a theoretical economic model which describes, in mathematical terms, the relationship between charitable giving, the tax treatment of such giving, and the resulting government revenue or revenue forgone. Such theoretical modelling differs from *econometric* analysis, which applies statistical methods to data with a view to estimating or testing the relationship of interest.[143] While the Productivity Commission conducted an econometric analysis to estimate the potential consequences of changes to tax deductions for *lifetime* charitable giving,[144] they have not done so for charitable bequests. In this section, we rely on the same theoretical economic model and refrain from offering an econometric analysis. However, we make intuitive use of our novel dataset of AFCA decisions to challenge the Productivity Commission's conclusion.

qualifying for welfare payments': at 18. Given the Age Pension and other welfare payments are subsidies or negative taxes, ignoring welfare payments means that their analysis exaggerates the overall taxation of the home.

140 *Future Foundations for Giving* (n 4) 311.

141 Ibid 20.

142 Commissioned by Philanthropy Australia, Impact Economics and Policy produced a report which estimates that significantly more benefits to charities than costs to the Australian Government would result from reducing superannuation taxes for bequests and allowing nominations of charities in binding death benefit nominations: *Superannuation Charitable Requests* (n 6) 5. The Productivity Commission disagrees with the methodology applied by Impact Economics and Policy: *Future Foundations for Giving* (n 4) 309–11.

143 Theoretical economic modelling sometimes proceeds or provides intuition for econometric analysis: see generally Jeffrey M Wooldridge, *Introductory Econometrics: A Modern Approach* (Cengage, 7th ed, 2018) 1–3.

144 *Future Foundations for Giving* (n 4) 119, 131–4, 309.

According to the Productivity Commission, a tax deduction to promote charitable giving should be 'treasury efficient' in the sense that 'the incremental increase in donations for the marginal dollar in revenue' is no smaller than 'the revenue a government forgoes'.[145] The following numerical hypothetical helps to explain what 'treasury efficiency' requires.[146] Suppose that while the superannuation tax for charitable bequests is in place, the will of a superfund member includes a charitable bequest in the amount of $\$g$ from their death benefits. Such a bequest is currently taxed at 15% (given the 2% Medicare levy does not apply when death benefits are paid to the member's estate for distribution according to their will).[147] Now suppose the tax is removed, and such removal incentivises the member to increase their charitable bequest in their will by $100. By removing the tax, the government forgoes two sources of revenue:

> Source (1): the revenue that would have been collected from the member's *existing* amount of charitable bequest, $\$g$. This amount of revenue forgone is $15\% \times \$g = \$0.15g$.
>
> Source (2): the revenue that would have been collected from the member's *increased* charitable bequest, $100. This amount of revenue forgone is $15\% \times \$100 = \$15$.

To be 'treasury efficient', removal of the superannuation tax for charitable bequests must incentivise an increase in charitable giving (in dollar terms) which exceeds the revenue forgone by the government. In the present hypothetical, the sum of the two sources of revenue forgone must be smaller than the $100 increase in charitable bequest; mathematically, $\$0.15g + \$15 < \$100$.[148] If not, then the tax removal is not 'treasury efficient'.

145 Ibid 129. The Productivity Commission nonetheless acknowledges that the 'treasury efficiency' analysis 'is not the only factor to consider when designing a policy to incentivise giving' because it 'does not account for the costs and benefits of giving or the other uses of forgone revenue': at 130.

146 This hypothetical applies the Productivity Commission's methodology and notation stated in *Future Foundations for Giving* (n 4) 423.

147 Despite the Productivity Commission referring to the 2% Medicare levy, it is not payable by the trustee of an estate of a deceased person pursuant to the *Income Tax Assessment Act 1936* (Cth) s 251S(1)(c). Under the *ITAA 1997* (n 68) s 302-10(3), where the superannuation death benefit nominee is the legal personal representative and the death benefit is paid to a non-dependant (including a charity) via the estate, the Medicare levy is not payable.

148 Removal of the tax would still be 'treasury efficient' if the total revenue forgone happens to exactly equal the increase in charitable bequests; mathematically, $\$0.15g + \$15 = \$100$: see *Future Foundations for Giving* (n 4) 130. However, this scenario is extremely unlikely to happen in reality.

What the Productivity Commission includes as total revenue forgone from removing a tax goes beyond the actual amount of revenue collected from that tax under the status quo. In the present hypothetical, the \$15 revenue forgone in Source (2) would have never been collected, regardless of whether the superannuation tax is in place. While the tax is in place, the member is not incentivised to increase their charitable bequest by \$100, so there is no revenue to collect from this non-existent \$100. Now, if the tax were removed, then the \$100 increase in charitable bequest incentivised by such removal would not be subject to this non-existent tax. In other words, when compared to the status quo, the only revenue actually lost upon removal of the tax is the \$0.15g from Source (1). However, given the Productivity Commission counts revenue forgone from both Sources (1) and (2) in their analysis of 'treasury efficiency',[149] and given not counting Source (2) will only reduce the total revenue forgone and hence strengthen the case for dropping the tax, for consistency in argument we follow the Productivity Commission in this regard.

The concept of 'treasury efficiency' applies more broadly, beyond the present numerical hypothetical. We now depart from the specifics of this hypothetical and consider instead charitable superannuation bequests in aggregate. Let t denote the current tax rate on charitable superannuation bequests; it generally equals 15%.[150] Suppose that while this tax is in place, the total amount of existing charitable bequests from all affected superfund members is \$$g$; in other words, interpret \$$g$ as the aggregate (instead of an individual member's) amount of charitable bequests. Suppose further that removal of the tax would incentivise more charitable bequests, where such increases would sum to \$$\Delta g$ in the

[149] Ibid 423–4. Additionally, see the example at 311. In this example, if the increase in charitable superannuation bequests would amount to \$20.9 billion, then the Productivity Commission would include 17% × \$20.9 billion ≈ \$3.6 billion as revenue forgone. This 17% tax rate includes the 2% Medicare levy, which does not apply to death benefits paid to non-dependants through a deceased estate: see above n 147. By using 17% instead of 15% as the tax rate in this example, the Productivity Commission assumed that the hypothetical increase in charitable bequests would be made directly rather than indirectly through a deceased estate.

[150] An exceptional scenario concerns death benefits derived from the untaxed taxable component of the excess superannuation balance, which are taxed at 30% plus any applicable Medicare levy: see above n 73. See also 'Tax on Super Benefits', *Australian Taxation Office* (Web Page, 2 August 2023) <https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/withdrawing-and-using-your-super/early-access-to-super/tax-on-super-benefits>, archived at <https://perma.cc/SW2F-YNP9>; 'Calculating Components of a Super Benefit', *Australian Taxation Office* (Web Page, 12 November 2025) <https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/apra-regulated-funds/paying-benefits/calculating-components-of-a-super-benefit>, archived at <https://perma.cc/9U29-D5KA>. However, this scenario is rare.

aggregate. The revenue forgone from not taxing the existing amount of charitable bequests $\$g$ is $t \times \$g$ (see Source (1)), while the revenue forgone from not taxing the increased amount $\$\Delta g$ is $t \times \$\Delta g$ (see Source (2)). Removal of the tax will be 'treasury efficient' if the total revenue forgone is smaller than $\$\Delta g$ itself; mathematically,

$$t \times \$g + t \times \$\Delta g < \$\Delta g.$$

This mathematical expression will be referred to as the 'treasury efficiency criterion'.[151] The left-hand side of the inequality (<) is the sum of revenue forgone from Sources (1) and (2), while the right-hand side is the increase in aggregate charitable bequests.[152]

To our best knowledge, lack of data on charitable superannuation bequests has been the main challenge for efforts to estimate the potential consequences of changes to the tax on such bequests. There is certainly data to support the production of estimates for potential changes to tax deductions for *lifetime* charitable giving. For instance, the Productivity Commission has produced such estimates using an ATO dataset on individual tax returns; this dataset has variables on individual taxpayers' lifetime charitable tax deductions and any superannuation death benefits received as non-dependants.[153] However, because charities are not individuals, the ATO dataset has no variables on their receipt of death benefits.[154] While there have been estimates of 'potential superannuation bequests to charities … based on the total amount of bequests to charities from individuals with valid wills in place, *excluding* superannuation',[155] the Productivity Commission questions such estimates.[156]

[151] This criterion is equivalent to 'the tax price elasticity of giving [having] an absolute value larger than one', which is what will justify a tax reduction according to *Future Foundations for Giving* (n 4) 424. To see this, drop the dollar sign ($) for simplicity, and let $\Delta t = -t$ denote the hypothetical removal of the tax t. Then the 'treasury efficiency criterion' is equivalent to $t \times \Delta g - \Delta t \times g < \Delta g$. Noting $\Delta t < 0$, some algebra obtains $-(1-t)\Delta g/(g\Delta t) > 1$, where $(1-t)\Delta g/(g\Delta t)$ is the tax price elasticity of giving.

[152] The notations g and Δg can be interpreted as either absolute dollar amounts or amounts relative to all superannuation bequests. The relative-amounts interpretation means that g and Δg denote proportions of all superannuation bequests; the dollar sign ($) should therefore be dropped.

[153] *Future Foundations for Giving* (n 4) 427–8, discussing Australian Taxation Office, 'Individual Tax Return 2022', *The ATO Longitudinal Information Files* (Web Page) <https://alife-research.app/research/forms/itr/2022/itr_i_super_lsum_txd>, archived at <https://perma.cc/D95Y-7YE5>.

[154] This is confirmed in an email exchange with the ATO on file with the authors.

[155] *Charitable Superannuation Requests* (n 6) 24 (emphasis added).

[156] *Future Foundations for Giving* (n 4) 309–11.

Our novel dataset of AFCA decisions now provides data on charitable superannuation bequests. In our sample of 269 decisions, 116 reveal information about the deceased member's will. Yet, only one will included a bequest to a charity from death benefits.[157] No decision reveals a direct nomination of a charity as a death benefit beneficiary given that such direct nomination is currently not permitted.[158] In other words, decisions involving a charitable superannuation bequest amount to about $1 \div 269 \approx 0.4\%$ of all decisions in our sample. This finding supports the inference that in the population of superannuation bequests, bequests to charities are likely to constitute a tiny percentage.

If, as our dataset suggests, existing charitable superannuation bequests are a tiny percentage of all superannuation bequests,[159] then it strengthens the case for finding that removal of the tax on charitable superannuation bequests would be 'treasury efficient'. Intuitively, if existing charitable superannuation bequests are tiny (relative to all superannuation bequests), then the revenue forgone from dropping the tax on such existing bequests must be even tinier (see Source (1) of revenue forgone). Moreover, the revenue forgone from not taxing the incentivised increase in charitable bequests is just a small percentage of such increase itself (see Source (2) of revenue forgone). Hence, the total revenue forgone may well be smaller than the increase in charitable bequests; the 'treasury efficiency criterion' is satisfied. Mathematically,

$$\underbrace{t \times \$g}_{tiny} + \underbrace{t \times \$\Delta g}_{\substack{smaller \\ than\ \$\Delta g}} < \$\Delta g$$

where $t \times \$g$ on the left-hand side of the inequality (<) in the 'treasury efficiency criterion' is tiny, while $t \times \$\Delta g$ on the left-hand side is only a small proportion of $\$\Delta g$ on the right-hand side.[160] Hence, the left-hand side may well be smaller than the right-hand side.

We acknowledge that our intuitive and empirical arguments do not amount to a robust econometric analysis. In particular, while our dataset of AFCA decisions suggests that the revenue forgone from dropping the tax on the existing amount of charitable superannuation bequests is tiny (relative to all

[157] See *Case No 784531* (n 65) discussed in Part II(B) above.

[158] See above Part II(A).

[159] See above n 65 and accompanying text.

[160] In terms of the analysis of price elasticity described in n 151, if g is close to 0 while Δg is positive, then the tax price elasticity of giving $-(1-t)\Delta g/(g\Delta t)$ is very large and hence likely to exceed 1.

superannuation bequests), this does not by itself conclusively establish that removal of the tax will necessarily be 'treasury efficient'. Removal of the tax must also incentivise a large enough increase in charitable bequests to justify the loss of revenue, however tiny such loss may be. But the bar for finding 'treasury efficiency' for present purposes is low; some algebra shows that the 'treasury efficiency criterion' requires the increase in charitable bequests $\$\Delta g$ to satisfy $\$\Delta g > [t \div (1 - t)] \times \$g \approx \$0.2g$.[161] In other words, the increase in charitable bequests only needs to be greater than about one-fifth of the existing amount of charitable bequests, where such existing amount is likely tiny.

It should be clarified that like most non-experimental samples used in social-scientific studies,[162] our sample of AFCA decisions does not constitute a random selection of the population of all superannuation bequests. A source of non-randomness is parties' self-interested decisions in relation to the filing and settlement of complaints. For example, if the death benefits in dispute are small, potential complainants may not find it worthwhile to file a complaint with AFCA.[163] Moreover, potential complainants may not file very weak complaints, while potential respondents may well settle very strong complaints.[164] Hence, instead of the full spectrum of superannuation bequests, our sample may only capture sufficiently large bequests subject to complaints of intermediate strength. However, non-randomness of a sample does not invalidate every possible inference from this sample. Instead, analysts need to address or overcome the challenges posed by non-randomness, and such endeavour is assisted by understanding the sources and consequences of non-randomness. In our case, the fact that our sample may not cover small superannuation bequests may actually *strengthen* our inference that charitable bequests constitute a tiny percentage of all superannuation bequests. This is because wealthier individuals

[161] If rounded to the third decimal place, then $[t \div (1-t)] \times \$g \approx \$0.176g$ if the tax rate t = 15% (excluding the 2% Medicare levy) or $\approx \$0.205g$ if t = 17% (including the Medicare levy).

[162] See, eg, Joshua D Angrist and Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist's Companion* (Princeton University Press, 2009) 16.

[163] For example, the Association of Superannuation Funds of Australia reports the average value of death benefits as \$128,000: Ross Clare, 'Superannuation Balances Prior to Death: Superannuation Balances of Older Australians' (Research Paper, Association of Superannuation Funds of Australia, March 2021) 13. By comparison, in our sample, the average value of death benefits is \$243,418.

[164] See George L Priest and Benjamin Klein, 'The Selection of Disputes for Litigation' (1984) 13(1) *Journal of Legal Studies* 1, 4. See generally Daniel Klerman and Yoon-Ho Alex Lee, 'Inferences from Litigated Cases' (2014) 43(2) *Journal of Legal Studies* 209.

tend to give more to charity (holding all else constant).[165] Hence charitable bequests may well be over-represented in our sample. If this is true, then the actual percentage of charitable bequests over all superannuation bequests may well be smaller than our sample percentage, namely 0.4%. Moreover, the strength of a complaint about a trustee's distribution of death benefits depends little on the inclusion or exclusion of a charity in the deceased member's will; AFCA is largely concerned with the factor of financial dependency.[166] Hence, the fact that our sample may only cover complaints of intermediate strength is unlikely to lead to under-representation or over-representation of charitable bequests.

It should also be clarified that the 'treasury efficiency' analysis is subject to qualifications, as the Productivity Commission has acknowledged. First, the 'treasury efficiency criterion' does not formally account for substitution effects in the sense that in response to removal of the tax on charitable superannuation bequests, superfund members may 'substitute away from giving now, and instead give in the future'.[167] In other words, members may give less to charity from their superannuation balances during their lifetime and more at death. However, as long as the increase in charitable bequests more than offsets any decrease in lifetime charitable giving, removal of the tax on charitable superannuation bequests still incentivises more charitable giving overall at the expense of a likely tiny amount of revenue forgone.[168] For this to happen, the tax

165 See, eg, *Future Foundations for Giving* (n 4) 87.

166 See above Part II(B); Barkley and Li (n 22) 224.

167 *Future Foundations for Giving* (n 4) 301.

168 More formally, modify the 'treasury efficiency criterion' as follows. Let $\$g_0$ denote the total amount of lifetime charitable giving from superannuation balances while the tax on charitable superannuation bequests is in place. Let $\$\Delta g_0$ denote any decrease in this amount if the tax is removed; $\$\Delta g_0$ is non-positive. Let $\$g_1$ denote the total amount of charitable superannuation bequests while the tax is in place, and $\$\Delta g_1$ the total increase in such bequests if the tax is removed. For removal of the tax (denoted by t) to be 'treasury efficient', the revenue forgone must be smaller than the change in total lifetime and post-mortem charitable giving. The 'treasury efficiency criterion' is now modified as

$$t \times \$g_1 + t \times \$\Delta g_1 < \$\Delta g_0 + \$\Delta g_1$$

where the revenue forgone from not taxing the existing amount of charitable bequests is $t \times \$g_1$ (see Source (1)) and that from not taxing the increased amount is $t \times \$\Delta g_1$ (see Source (2)). The change in total lifetime and post-mortem charitable giving is $\$\Delta g_0 + \$\Delta g_1$.

The modified 'treasury efficiency criterion' is equivalent to $t \times \$g_1 < \$\Delta g_0 + (1-t) \times \$\Delta g_1$, where our dataset of AFCA decisions continues to suggest that the left-hand side ($t \times \$g_1$) is likely tiny. The right-hand side ($\$\Delta g_0 + (1-t) \times \$\Delta g_1$) may theoretically be positive or not. Hence, removal of the tax on charitable superannuation bequests may satisfy 'treasury efficiency' even if there may be substitution of charitable giving at death for charitable giving at lifetime.

removal must also incentivise substitution away from some *non-charitable* spending during lifetime or at death. At least at the level of theory, 'treasury efficiency' considerations do not necessarily argue against our proposed tax removal, even if such removal would lead to substitution of charitable giving at death for charitable giving during lifetime.

Second, the 'treasury efficiency criterion' does not formally account for 'the costs and benefits of giving or the other uses of forgone revenue'.[169] For instance, the government may use some of the revenue collected from taxing charitable superannuation bequests to provide socially valuable goods and services themselves. The government may also redistribute some of the revenue collected to charities as grants.[170] However, as argued above, our dataset of AFCA decisions suggests that the revenue currently collected from taxing charitable superannuation bequests is likely tiny (where such revenue is $t \times \$g$, from Source (1) in our 'treasury efficiency' notation). Therefore, any provision of goods, services or grants to charities funded by such revenue is also likely tiny at best.[171] A stream cannot rise above its source. Hence, forgoing such revenue is unlikely to result in much loss in the provision of goods, services or grants to charities by the government.

Third, for the subset of social goods and services that may be provided by the government or charities, the Productivity Commission observes that government spending on such goods and services may 'crowd out' or 'crowd in' charitable giving in support of the same goods and services. 'Crowding out' occurs if *increased* government spending leads donors to find it less necessary or desirable to continue giving to the relevant charities.[172] 'Crowding out' also occurs if increased government spending leads the relevant charities to 'scale back their fundraising activities because the cost of [their projects] is now funded'.[173]

[169] *Future Foundations for Giving* (n 4) 130.

[170] Ibid 301. Government grants constituted 48.4% of charities' revenue in 2023: *Australian Charities Report* (n 84) 12. How much of these grants were funded by the superannuation tax on charitable bequests is not known.

[171] Notionally, suppose that the government spends δ proportion of the revenue $t \times \$g$ currently collected from taxing charitable superannuation on socially valuable goods and services and as grants to charities. Such government spending amounts to $\delta \times t \times \$g$. Given $\delta \leq 1$ as a proportion, it must be the case that $\delta \times t \times \$g \leq t \times \$g$. Hence, if $t \times \$g$ is tiny, as our dataset of AFCA decisions suggests, then $\delta \times t \times \$g$ must be tiny at best.

[172] *Future Foundations for Giving* (n 4) 130.

[173] Ibid. For how the 'treasury efficiency' analysis can be modified to account for 'crowding in' and 'crowding out', see generally Russell D Roberts, 'Financing Public Goods' (1987) 95(2) *Journal*

Alternatively, 'crowding in' occurs if it 'spurs a charity to seek more philanthropic funding to achieve its aims'.[174] The empirical evidence on the relative prevalence of 'crowding out' and 'crowding in' is mixed and sensitive to context; about two-thirds of the empirical studies found 'crowding out'.[175] Hypothetically, if 'crowding out' were to occur in the present context, then any *reduced* government spending (due to losing the revenue collected from taxing charitable superannuation bequests) would have the opposite effect of increased government spending: donors would be encouraged to give more to charity, or charities would be encouraged to increase their fundraising efforts. Of course, a context-specific econometric analysis would help ascertain whether this hypothetical would likely eventuate in reality. Our point is that at the level of theory, consideration of 'crowding in' or 'crowding out' alone does not caution against our proposal to drop the tax on charitable superannuation bequests.

In summary, assuming the Productivity Commission is correct to require satisfaction of 'treasury efficiency', this requirement does not present an insurmountable obstacle for our proposal to remove the tax on charitable superannuation bequests. To the contrary, our dataset of AFCA decisions suggests that such removal is likely 'treasury efficient'. To be sure, neither our nor the Productivity Commission's analysis of 'treasury efficiency' is grounded in formal econometrics. If 'treasury efficiency' must be satisfied, then further investigation of this issue with fuller empirical evidence and/or more robust econometric techniques is warranted.

C *Protecting Dependants and Other Family Members*

Resisting reform proposals to encourage charitable superannuation bequests, the Productivity Commission further raises the concern that 'adequate safeguards need to be established to protect fund members and their dependants'.[176] Increasing charitable bequests — by enabling direct nominations of charities as death benefit beneficiaries and/or by reducing the tax on charitable superannuation bequests — necessarily leads to less bequests to dependants or other

of Political Economy 420; Richard Steinberg, 'The Design of Tax Incentives for Giving' in Giedre Lideikyte Huber and Henry Peter (eds), *The Routledge Handbook of Taxation and Philanthropy* (Routledge, 2021) 178, 181–2.

174 *Future Foundations for Giving* (n 4) 130.

175 See generally Arjen De Wit et al, 'Do Government Expenditures Shift Private Philanthropic Donations to Particular Fields of Welfare? Evidence from Cross-Country Data' (2018) 34(1) *European Sociological Review* 6.

176 *Future Foundations for Giving* (n 4) 304–5.

family members. The size of the death benefits pie is fixed; a bigger slice for charities must mean smaller slices for dependants or other family members.

There are two issues of principle with the concern that charitable superannuation bequests are made at the expense of dependants or other family members. First, this concern is not specific to superannuation death benefits; the same can be said of charitable bequests from any asset. Second, addressing this concern requires balancing the policies of promoting testamentary freedom and charitable giving against that of protecting dependants and other family members. Such balance can be struck on a case-by-case basis, in part because not all dependants and other family members need or deserve protection.[177] There is already a body of law specifically designed for striking such balance of policies on a case-by-case basis: family provision law.

As Part III(B) discusses, state-based family provision law provides protection for dependants and other family members who have not received adequate provision from the deceased. In fact, although superannuation death benefits do not automatically form part of a deceased estate, the New South Wales family provision legislation contains 'notional estate' provisions which permit the use of superannuation death benefits to satisfy a successful family provision claim.[178] However, family provision law in states and territories other than New South Wales does not have equivalent 'notional estate' provisions to capture superannuation death benefits.[179] Hence, outside New South Wales, superannuation death benefits do not automatically enter the deceased estate and therefore are beyond the reach of a family provision claim. To address this concern, extension of family provision law to death benefits can be achieved by legislative reform at the state/territory level. However, to date, efforts to introduce New South Wales-style notional estate provisions in other states and territories have not been successful.[180] At the federal level, there may be a simpler way to address this concern. Our proposed reforms can be adopted with a slight modification: any death benefit bequeathed to a charity must first be paid to the legal personal representative and pass through the (actual) deceased estate.

[177] For example, a dependant may have committed domestic violence against the deceased: see, eg, *Case No 923333* (Australian Financial Complaints Authority, 27 November 2023) 4.

[178] *Succession Act 2006* (NSW) s 63(5), pt 3.3; *Kelly v Deluchi* [2012] NSWSC 841, [163] (Hallen AsJ).

[179] This is despite the National Committee for Uniform Succession Laws recommending that all states and territories adopt a notional estate approach: Queensland Law Reform Commission, *Report to the Standing Committee of Attorneys General on Family Provision* (Miscellaneous Paper No 28, December 1997) 92–4. See also Croucher and Vines (n 107) 725 [15.24].

[180] See Croucher and Vines (n 107) 725 [15.24].

That way, it will be possible for family provision claims to reach superannuation death benefits in all states and territories, and the courts can assess the merits of any such claims on a case-by-case basis.

V Conclusion

The Productivity Commission maintains that there should be 'a high evidence threshold for any changes to superannuation legislation or the tax treatment of superannuation'.[181] For fear of affording more tax concessions to superannuation and impairing the interests of dependants, it has resisted reform proposals to promote charitable giving with superannuation bequests.[182] In this article we find that the Productivity Commission's concerns are unjustified. Instead, we argue for the removal of legal impediments to donating superannuation death benefits to charity. In particular, Australians should be allowed to directly include a charity in death benefit nominations, and charities should not be taxed when they receive a death benefit bequest. We have shown that these proposed reforms can be cost-effective to the Australian Government and can accommodate the interests of dependants and other family members. Adopting these reforms will not only promote testamentary freedom and inter- and intragenerational equity, but also help the Government achieve its goal of doubling philanthropy by 2030.

181 *Future Foundations for Giving* (n 4) 301.

182 Ibid 304, 311.