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The Executive Director
Australian Law Reform Commission
GPO Box 3708
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*By email: elder_abuse@alrc.gov.au*

3 March 2017

Dear Commissioners,

**AFA Submission – Elder Abuse**
**(Discussion Paper 83)**

The Association of Financial Advisers Limited (AFA) has served the financial advice industry for 70 years. Our objective is to achieve Great Advice for More Australians and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are required to be practising financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

## Summary of the AFA's position on elder abuse

The AFA supports the Commission's proposals to reform Australian laws in order to protect our elderly citizens. The AFA considers each proposal in Discussion Paper 83 has value and should substantially contribute to a more robust framework of protections.

In particular, the AFA expects that financial advisers will be better supported in their roles by the framework of reforms proposed for enduring documents – or as proposed by the Commission to be called going forward, Representative Agreements. These are sensible and welcome proposals and we look forward to when nationally consistent laws are implemented to govern the use and execution of enduring documents.

## The AFA's responses to the Commissions additional questions

Supplementary to our initial submission dated 2 September 2016, we provide the following additional submissions to the questions that the Commission has proposed in Discussion Paper 83:

**Question 5–1 Who should be permitted to search the national online register without restriction?**

Whilst the AFA generally supports transparency of information, it is possible that making a national register of enduring representatives open to everyone could result in representatives being placed under undue pressure or exposing their identities to commercial interests. Both of these issues could have residual effects on the older person or could place the representative into positions where they may contemplate placing the other interests ahead of the older person's interests.

Accordingly, the AFA supports restricting the availability of information to only those organisations and entities who have a legitimate need for that information. To assist the below services be effective in their contribution to protect the elderly, the AFA submits that automatic access should be granted to:

- **Prescribed governmental organisations** – such as the police, Centrelink and the Australian Securities and Investments Commission (**ASIC**); and
- **Prescribed investigative / supervisory organisations** – such as public advocates, public guardians, the tribunals proposed by the Commission, the Superannuation Complaints Tribunal and the Financial Ombudsman Service.

The AFA also submits that the authority vested with the responsibility for maintaining the online register should be able to provide information stored on the register to people who submit an approved application. This process would enable financial advisers, financial institutions, legal professionals, court staff, medical professionals, family members of elderly people and others with an interest in knowing the identity of who is managing the affairs of an older person as well as the terms of any enduring documents lodged with the authority.

Any fees relating to the application process should be limited to covering the cost of processing the application. The AFA submits that the application process should be reviewed every twelve months for the first five years, particularly with a view to assessing whether the application process unreasonably delayed providing important information to any applicant and to assess the cost of any such delay to the elderly person.

**Question 5–2 Should public advocates and public guardians have the power to conduct random checks of enduring attorneys' management of principals' financial affairs?**

The AFA supports this proposal. Professionals who are engaged to assist elderly people to manage their financial affairs must act with the professional standards of an expert. The higher duties of care expected of professionals results in professionals being subject to supervision and monitoring frameworks – either enforced, such as through legislative requirements like the *Corporations Act* 2001 regime for financial advisers or voluntary compliance systems. The community expects enduring attorney and guardians to also act with care, skill and diligence of a higher order when managing the affairs of older people because these people are often in vulnerable positions.

If the vulnerability of older principals gives rise to a higher standard of care, then it should also give rise to standards of compliance and scrutiny over the representatives' actions – regardless of whether the representative is a professional or not. Without random compliance checks or audits of how all elderly principals' financial affairs are being managed, temptations to mismanage or to act in a conflicted manner may arise putting the integrity of the reforms at risk.

**Question 6–1 Should information for newly-appointed guardians and financial administrators be provided in the form of:**

**(a) compulsory training;**

**(b) training ordered at the discretion of the tribunal;**

**(c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or**

**(d) other ways?**

The AFA supports compulsory training for first-time appointments and for the tribunal to be granted discretion to require or waive the need for guardians and financial administrators to undertake subsequent training on their responsibilities.

It is important to develop and encourage expertise amongst guardians and administrators because with expertise comes effectiveness. To require every newly-appointed guardians and financial administrators to undertake compulsory training on their responsibilities, regardless of whether they have been appointed to a similar role, is unnecessary and can impose a cost burden to those appointed, which may be passed onto the principals. Whilst it could form part of an annual review / assessment process or ongoing development for such people, it is as unnecessary in the AFA's view for regularly-appointed guardians and financial administrators to be repeatedly informed about their responsibilities at every new appointment as it is for other professionals to be required to undertake training for areas of demonstrated competencies.

The AFA does not support newly-appointed guardians and financial administrators being informed about their responsibilities through an information sheet or other information-providing process below the standard of training because such a process may not appropriately assess the understanding and competencies of the guardians and financial administrators. Guardians and financial administrators may not always be a professionally trained person. As these people are in a position to substantially adversely affect the financial position of elderly principals, it is imperative that they understand the higher standards of care and record keeping required of them.

The AFA submits that an information giving process would rely on surveillance, complaints or compliance to assess recipients' understanding, which can often be too late to unwind misconduct or improper actions. Training on the other hand that involves a human trainer can involve varying levels of assessment, remediation and approval into the training process to ensure understanding and competency.

**Question 6–2 In what circumstances, if any, should financial administrators be required to purchase surety bonds?**

The AFA supports in-principle the proposals of the Qld and NSW trustee services to require a surety or bond be lodged by financial administrators. We agree that while likely to be infrequent, mismanagement and fraud by

financial administrators can occur and a surety system is likely to assist with the recovery of elderly principals' funds as well as provide a measure of deterrence against mismanagement. However, whether such a surety system would require all administrators to hold indemnity insurance as professionals do or be in the form of a bond is a difficult assessment to make.

The AFA submits that any form of surety scheme that involves lodging small percentages of a principals' assets could give rise to some moral hazard if financial administrators have limited immediate liability for mismanagement. If the immediate cost of mismanagement is below the risk involved for administrators, it could result in avoidance behaviour such as phoenix activity, insolvency or flight. The AFA submits that the size of the penalty to the administrators and the size of guarantee of recovery must outweigh the attraction to mismanage or engage in fraud.

The AFA also submits that indemnity insurance schemes have limitations as well when applied to administrators. A large element of deterrence exists in professional indemnity schemes because professionals know that an indemnity insurance claim against them has future implications for their execution of their profession – whether due to higher premium costs or the reflection that a claim has on their reputation and community standing. Whilst professional misconduct exists despite this, the AFA submits that the occurrence of misconduct is lower because of the consequences that inherently exist in professional indemnity insurance schemes. As appointed financial administrators may not be repeat players, these elements may not translate into the same level of deterrence posed by an indemnity insurance scheme over administrators' conduct.

Further, the premium costs involved in indemnity insurance may be substantially prohibitive for non-professional administrators. Insurance by its very nature requires an assessment of the risk involved with a particular activity or situation. Whilst the AFA supports more Australians benefitting from a professionals' financial administration activities, we appreciate that not every elderly principal can afford the services of a professional. In some cases, the principal's affairs may also be simple or straight forward and therefore not outside the capacity of non-professional people. However, lack of education or training – or not being bound by a Code of Professional Conduct – could be regarded by insurers as presenting a higher risk and therefore result in higher premiums.

The AFA appreciates the difficulty with designing a surety system for financial administrators that balances the need for surety along with accessibility and cost considerations. The AFA submits that professionals who are appointed as a financial administrator could be required to demonstrate to a surety authority that they have adequate professional indemnity insurance to cover their activities as a financial administrator. Whilst this may also represent a barrier for professionals to offer to be financial administrators if they have not been a financial administrator before or from administering substantially wealthy estates, it is also likely to result in expertise in financial administration being developed which can in turn have a downward effect on premiums as insurers assess those with expertise and experience as representing a lower risk.

For non-professional financial administrators, the answer is more difficult. Due to the infancy of comparative systems, the AFA supports a measured approach and one subject to frequent reviews in the first decade of operation. The AFA sees merit in the NSW system of requiring financial administrators to lodge bonds that change depending on the size of the principal's assets / estate. An annual bond that represents a percentage of the asset / estate appears to be a sensible system to explore further. However, the level of the bond, percentage or any conditions for the inaugural year of operation is difficult to gauge.

**Question 6–3 What is the best way to ensure that a person who is subject to a guardianship or financial administration application is included in this process?**

The AFA supports tribunals being required, where possible, to speak with a person who is subject to a guardianship or financial administration order regardless of their attendance at the hearing before the tribunal appoints a guardian or financial administrator. It is important for the integrity of the system that guardianship or financial administration is not imposed upon a person without their knowledge. This process would also assist tribunals to assess the capacity of the principal to understand what the guardianship or administration means for them, their likely compliance with the orders and any regard (or lack of) they have for an applicant guardian or financial administrator.

**Question 7–1 Should the *Superannuation Industry (Supervision) Act 1993* be amended to:**

**(a) require that all self-managed superannuation funds have a corporate trustee;**

**(b) prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;**

**(c) impose additional compliance obligations on trustees and directors when they are not a member of the fund; and**

**(d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?**

*Corporate SMSF trustees*

The AFA is comfortable that SMSF Corporate Trustee structures can enable more flexibility over time. A cautionary note however, as a corporate trustee is also a pre-requisite for limited recourse borrowing arrangements, we note that these are not appropriate for all SMSFs. ASIC has previously expressed concern about property investment seminars run around the country (particularly in retirement areas like the Gold Coast or southern Western Australia) by people who are not licensed to provide financial advice. If all SMSFs were eligible for limited recourse borrowing arrangements, the ability for these property spruikers to tempt people into inappropriate property investments or investments that comprise an SMSF's entire asset-base would likely increase. This could have an effect on investment lending by financial institutions, property prices in some areas, credit risk assessments by credit rating agencies and ultimately, the Australian economy. Whilst it is appropriate for some SMSFs to have access to limited recourse funds as an appropriate portion of their portfolio, the AFA submits that these are all unintended consequence that should give rise to caution against homogenising the SMSF trustee requirements.

*When SMSF trustees lose capacity*

The AFA does not support prescribing arrangements when SMSF trustees lose capacity because SMSF trustees are subject to ordinary legal protections available to other people, such as where a person is alleged to have lost capacity to manage their own affairs others who have concerns about the person's capacity can apply to have a guardian appointed and the subject can dispute it. Prescribing rules specifically for trustees would appear to duplicate things.

While we understand that for SMSF trustees, the consequences of delaying the dealing with a person's capacity issues may result in financial loss, this is no different to other members of the public. The AFA does

not suggest changing the ordinary processes available for addressing those issues, nor for changing the rights SMSF trustees would otherwise have as an ordinary member of the public.

*Trustees who are not members of an SMSF*

The general requirement is that all SMSF members must also be trustees of the SMSF. However, as a corporation can be a trustee and the members of the SMSF are then required to also be directors of the corporate trustee, other people are not prevented from being directors of the corporation as well. Where this situation arises, the AFA does not support those non-member directors having any additional obligations to the other directors because each director must comply with the director duties under the common law and *Corporations Act 2001*. The AFA does not consider it appropriate to place different obligations upon different directors of SMSF trustees.

*Superannuation Complaints Tribunal access*

The AFA supports that all self-managed superannuation funds (**SMSFs**) having access to the Superannuation Complaints Tribunal (**the SCT**). Whilst this will result in higher operating costs for SMSFs due to the membership costs of the SCT and higher costs can have an effect on investment returns, the AFA submits that the benefits that come with SMSFs should not be available to people who cannot afford the costs of operation or be able to offset those costs.

We appreciate that there is an argument that most SMSFs are unlikely to need dispute resolution services because a high proportion of SMSFs are established by people who are related to each other, but the opposite argument applies as well – that people who are related to each other may have greater need for an independent service than unrelated people.

Further, where there is a dispute involving an SMSF that involves a financial adviser or another financial services provider (such as a financial product issuer), the lack of SCT jurisdiction over the issues represents a gap in the framework when the issues may potentially involve a question of whether the trustee complied with their obligations under the *Superannuation Industry (Supervision) Act 1993*. Currently, where a dispute involves such an issue, the Financial Ombudsman Service have to make speculative assessments of apportionment of responsibility when they may not have the power to require a trustee to answer particular questions or provide particular documents.

**<u>Question 7–2</u> Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?**

*Current restrictions and requirements when interacting with SMSFs*

There are current restrictions on who can provide financial advice and other services to SMSF trustees or people looking to establish an SMSF. Provisions of Part 7.6 of the *Corporations Act 2001* restrict who can provide financial product advice about SMSFs, whether that be recommending to establish an SMSF, change a Fund Investment Strategy or about the underlying investments to be held by an SMSF. Likewise, any act that assists a person to acquire, dispose or change their holding in an SMSF is restricted to people authorised under an AFS Licence to provide 'dealing services' regarding superannuation. Services that are considered to be dealing services for SMSF can include:

- Anything that would enable an SMSF to be established – such as preparing a Trust Deed, preparing a Fund Investment Strategy, preparing the paperwork required for a trustee to rollover or otherwise contribute superannuation funds to their SMSF;
- Anything required to wind up an SMSF;
- Adding or removing members from an SMSF;
- Adding or withdrawing member funds from an SMSF; and
- Assisting an SMSF member to draw a pension from an SMSF.

Further, ASIC expects that an AFS Licensee will ensure that representatives who advise on or provide dealing services to SMSF trustees have adequate knowledge, qualifications, educations and skills when providing services to SMSF trustees. As a result of this, the financial advice profession has developed specialisation courses and qualifications for SMSFs, continuing professional development courses and training is available in the market and a professional association dedicated to SMSF professionals provides the SMSF Specialist Advisor designation to competent financial advisers.

*Exemptions*

These specialist knowledge and skills requirements, licensing requirements and other restrictions such as consumer protections (see below) do not apply to accountants who provide prescribed professional services (called 'exempt services') to SMSF trustees[1] or to representatives who provide financial services to SMSFs whom they categorise as wholesale clients.[2] The AFA does not support all of the exemptions on the restrictions to advise on or deal in SMSF services.

Advisory and dealing financial services to SMSF trustees are subject to retail client and wholesale client thresholds under sections 761G, 761GA of the *Corporations Act 2001* and the associated *Corporations Regulations 2001*.[3] As noted by ASIC in Media Release 14-191MR[4] there are some particular legal uncertainties about the application of the net assets test thresholds when dealing with and advising on SMSFs. ASIC has given guidance that a person can "make their own commercial decisions" whether an SMSF is classified as a retail client based on the $10m net assets test under section 761G(6)(c)(i) or the lower general net assets test of $2.5m net assets under section 761G(7)(c)(i).

As advice firms and accounting practices have developed differing guidance to their representatives about when an SMSF must be considered a retail client. This has resulted in differing practices about when SMSF trustees are provided with Statements of Advice, when compliance with the Best Interests Duty is required, give general advice warnings, provide appropriate financial advice and prioritise the SMSF trustee's interests are required when dealing with an SMSF.[5] If an advice firm's or an accounting practice's policy is to apply the general net assets test, all SMSFs with net asset above $2.5m do not get the benefit of these protections.

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[1] *Corporations Regulation 2001* regulation 7.1.29.

[2] ASIC Regulatory Guide 146, *Licensing: Training of financial product advisers,* Australian Securities and Investments Commission (issued July 2012, updated September 2012), available at http://download.asic.gov.au/media/1240766/rg146-published-26-september-2012.pdf

[3] *Corporations Regulation 2001* regulations 7.1.28, 7.6.02AA, 7.6.02AB, 7.6.02AC, 7.6.02AD

[4] Media Release 14-191MR, *Statement on wholesale and retail investors and SMSFs*, Australian Securities and Investments Commission (issued 8 August 2014), available at http://asic.gov.au/about-asic/media-centre/find-a-media-release/2014-releases/14-191mr-statement-on-wholesale-and-retail-investors-and-smsfs/

[5] Respective to the order of requirements listed in the paragraph above, sections 946AA (SoA), 961B (Best Interests Duty), 961G (appropriate advice), 961J (priority rule) and 949A (general advice warnings) of *Corporations Act 2001* only apply to financial services provided to retail clients. Once an SMSF client is categorised as a wholesale client – whether by the $2.5m or the $10m net assets tests under section 761G(6)(c)(i) or 761G(7)(c)(i) respectively, the provider of the service no longer has to comply with those provisions.

Further, and as confirmed by ASIC in MR14-191, SMSFs classified as wholesale clients gain access to a wider range of investments – including in particular those considered too risky for protected retail clients to invest in and only available to wholesale clients.

This issues goes back beyond 2014, however. As referred to in the ASIC Media Release, a 2011 Treasury options paper called *Wholesale and retail clients: Future of financial advice*[6] acknowledged confusion about how the wholesale investor tests applied when providing financial services to superannuation trustees. ASIC also stated that it was aware of general uncertainty in the market about when a financial service relates to a superannuation product, and in particular SMSFs. The AFA considers these uncertainties and confusion to be exposing elderly Australians to predatory conduct by people who seek to exploit their wealth without being required to provide the same level of consumer protections that licensed financial advisers must.

The AFA recommends that the Commission examine the impact that the legal inconsistencies and ambiguities have on elderly people. As elderly people are probably more likely than younger people to have $2.5m or more of net assets, elderly people are more likely to be encouraged to establish and operate an SMSF. The AFA is concerned that some SMSFs services, such as property investment seminars that inform people about the benefits of investing through an SMSF and some accountant services, may currently be provided by people who are either not complying with the licensing regime and the associated consumer protections or otherwise exempt from it. ASIC has also expressed concern about SMSF activities of property spruikers[7] and accountants.[8]

As SMSFs are a specialist type of financial product – and probably more appropriately categorised as a retirement funds holding vehicle than an end product –the AFA considers it should benefit from more consistent laws and guidance from the regulators than it currently receives. Elderly Australians should also be able to expect that the education and skills requirements that apply to SMSF professionals should also be consistent. Financial advisers who assist elderly Australians with their SMSFs should also be able to expect that other professionals – such as accountants – that they engage the services of should also be required to have the high levels of education and specialist knowledge. Accordingly, the AFA supports restrictions on advising and assisting SMSF trustees and recommends that the inconsistencies and ambiguities in the law should be removed to better protect elderly Australians.

## Closing remarks

Current issues affecting SMSFs affect the integrity of our retirement system and consumer protection laws. Elderly Australians should be able to expect the system to protect them from predatory behaviour or

[6]See paragraph 2.6, *Wholesale and retail clients: Future of financial advice*, Department of Treasury, (January 2011) available at http://futureofadvice.treasury.gov.au/content/consultation/wholesale_retail_op/downloads/wholesale_and_retail_options_paper.pdf

[7] See *ASIC goes undercover to expose property spruikers*, Australian Financial Review (16 February 2017), available at http://www.afr.com/real-estate/asic-gets-tough-on-unlawful-property-spruikers-20151126-gl8fuf and *ASIC gets tough on unlawful property spruikers*, Australian Financial Review (6 December 2015), available at http://www.afr.com/real-estate/asic-gets-tough-on-unlawful-property-spruikers-20151126-gl8fuf

[8] See *Carwardine Financial Services to undergo review over best interests duty*, IFA Magazine (6 February 2016), available at http://www.ifa.com.au/news/17174-carwardine-financial-services-to-undergo-review-over-best-interests-duty?utm_source=IFA&utm_campaign=IFA_Newsflash06_12_2016&utm_medium=email which involved a self-licensed accountant firm and *ASIC fires warning shot for accountants giving advice*, RiskInfo (7 June 2016), available at http://riskinfo.com.au/news/2016/06/07/asic-fires-warning-shot-for-accountants-giving-advice/

opportunistic operators who skirt on the edge of the licensing and consumer protection requirements. As the Australian population ages, this will become more relevant to more people.

The AFA supports the Commissions interim proposals to better protect our older people and considers the clarifications and recommendation above capable of helping to fine tune the Commission's proposals for reform.

If you require clarification of anything in this submission, please contact us on 02 9267 4003.

Yours sincerely,

**Brad Fox**
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Association of Financial Advisers Ltd