6th March 2017

Sabina Wynn
The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

E-mail: info@alrc.gov.au

Dear Ms Wynn,

The Financial Services Council (FSC) welcomes the opportunity to make the following submission to the Australian Law Reform Commission's Discussion Paper on Elder Abuse.

The FSC has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

1. The FSC commends the scope and direction of the ambitious set of reforms put forward by the ALRC. We are cognisant that the nature of implementation and governance of these reforms will be paramount to their effectiveness given the complex nature and environment in which elder abuse manifests itself across different jurisdictions.

2. The FSC notes that much work is being done regarding the optimal models for Enduring Powers of Attorney (EPA) laws across different states, with particular focus on Victoria and New South Wales. The insights and lessons learned from reforms in these jurisdictions should be appropriately considered in any proposed national reforms.

3. The FSC continues to be supportive of the development of a national register of EPAs. We note, however, that this would require input from the States and Territories to ensure the experience of different jurisdictions are considered in developing the register. Specifically, it is critical to understand how State and Federal legislation would interact in facilitating a national register for the Enduring Powers of Attorney, and to prepare for interim parallel models, such as State-based registers that are able to exchange information with other States and Territories, prior to implementation of a national register.

4. Changes to EPA laws should be managed so that appointees are able to manage the requirements and are not deterred due to unnecessarily onerous obligations. A balance

must be found between appropriate safeguards and still facilitating access to these instruments.

5. The FSC is supportive of measures to protect those individuals and institutions who report instances of elder abuse. Appropriate avenues for redress must be clearly disclosed in order to guide the responsibility of financial services professionals when encountering such instances. This may include a helpline, guidance documents or online resources.

6. The FSC is supportive of a National Plan and a plan to enhance the research base on elder abuse. The FSC supports policy outcomes that are evidence-based so as to ensure that reforms are effective and targeted towards both prevention and deterrence of elder financial abuse.

7. The FSC identifies a public awareness and education campaign, particularly targeted towards the elderly, as a critical step in addressing this issue. This also needs to encompass programs targeting improvements in financial literacy and use of estate planning instruments.

8. The members of the FSC acknowledge the important role played by financial institutions in mitigating, preventing, deterring and responding to elder financial abuse. The FSC supports steps towards the development of appropriate resources and processes to allow financial institutions to effectively respond to such incidents with the backing of appropriate legal mechanisms. We suggest that reforms regarding compliance obligations for financial institutions must be evidence-based and preceded by appropriate public education, as well as legal and structural safeguards and processes.

The FSC provides the following responses with regards to latest Discussion Paper issued by the ALRC, focusing specifically on areas that are relevant to elder financial abuse and the experiences and perspectives of the financial institutions that work with and are represented by the FSC.

We thank you for the opportunity to respond to this important issue and continue to support and encourage considered legislative action on this issue.

Please direct any questions or queries to Nithya Iyer at niyer@fsc.org.au or alternatively on 0423 728 143.

Sincerely,

Nithya Iyer
Senior Policy Manager, Trustees
Financial Services Council

2. National Plan

Proposal 2–1 A National Plan to address elder abuse should be developed.

The FSC is supportive of a National Plan to address elder abuse. In particular, the FSC recommends that a National Plan include:

1. *A comprehensive and targeted public awareness and education campaign on elder abuse.*

In particular, regarding elder financial abuse, the experience of trustees suggests that a lack of understanding by many elderly clients regarding what constitutes elder abuse and how to seek assistance in situations of suspected elder abuse is a significant contributor to its increasing prevalence. As such the National Plan should address how public education campaigns target communication to the elderly, and ensure that education on elder abuse is simple and palatable allowing it to be easily understood and communicated.

The FSC notes that the government has run successful campaigns on similar issues, such as family and domestic violence, and responsible drinking, and suggests that similar awareness raising through public and private channels would be an effective preventative measure.

2. *Resourcing of a national contact point for elder abuse.*

A national contact point for elder abuse, administered as a helpline as well as an online portal, is critical in providing vulnerable members of the public with reliable information on appropriate steps of action where elder abuse is present. The FSC notes the important work done by State-based organisations and community groups in providing avenues of contact and assistance for elder abuse victims and family members of victims. In some cases, these organisations have developed rapport in their communities for these services. As such any national contact point administered by the government would be most effective when working in cooperation with these organisations including, where appropriate, ensuring that these organisations are appropriately resourced.

Organisations offering support in elder abuse include, but are not limited to, the NSW Elder Abuse Helpline (NSW), the Older Persons Abuse Prevention Referral and Information Helpline (ACT), the Elder Abuse Prevention Unit (QLD), Aged Rights Advocacy Service Alliance for the Prevention of Elder Abuse (SA), Tasmanian Elder Abuse Helpline (TAS), Senior Rights Victoria (VIC) and Advocare (WA). The FSC notes that these organisations have been critical in collecting data and providing a point of contact for those peoples at risk.

3. *A long-term strategy on improving financial literacy and increasing awareness of the importance of Wills and Powers of Attorney instruments in personal wealth management.*

As noted above, the experience of FSC members in cases of elder financial abuse suggests that a lack of awareness significantly contributes to the increased prevalence of elder financial abuse. In addition, the FSC believes that the development of a long-term strategy on improving financial literacy and increasing awareness on how to manage personal wealth is integral to the eventual alleviation of elder financial abuse. Research by State Trustees Limited, as referenced

in our previous submission, highlights correlations between those groups most vulnerable to elder financial abuse and those groups with lower levels of financial literacy[1]. This finding is also consistent with the findings of research in the United States[2].

Similarly, instances of elder financial abuse frequently include the abuse of Powers of Attorney instruments. Aside from particular reforms to these instruments, a greater public understanding of the purposes of these instruments, including the importance of appointing Powers of Attorney appropriate to the needs of the individual, are integral to a long-term reduction in elder financial abuse. Additionally, a cultural shift towards better practices in estate management and the development and execution of Wills are considered critical in reducing the legal loopholes and bureaucratic discrepancies that provide opportunities for elder financial abuse to take place.

4. *Training and resources for POA appointees and those authorised to witness POA and EPA appointments.*

A critical step in ensuring the ongoing effectiveness of existing and additional safeguards in POA and EPA instruments is the appropriate training of those authorised to witness POA and EPA appointments. FSC members note that those authorised to witness POA/EPA appointments are not consistently informed regarding their responsibilities to capacity-test. The FSC suggests that training and resources are accessible to those authorised to witness these instruments.

Proposal 2–2 A national prevalence study of elder abuse should be commissioned.

The FSC supports Proposal 2-2 regarding the commissioning of a national prevalence study of elder abuse.

The FSC understands that a number of institutions and organisations keep informal data on elder financial abuse, however privacy laws and a lack of harmonized strategy between groups results in information that is incomparable or incomplete. Alongside a national prevalence study, clear guidelines on the kinds of data that can be collected by particular organisations in light of their responsibilities to the public, may contribute to the gathering of a wider set of empirical data for future policy decisions.

3. Powers of Investigation

Proposal 3–1 State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:

[1] Diversity and Financial Elder Abuse in Victoria, Protecting Elder's Assets Study, 2011, research by Monash University, commissioned by State Trustees Limited, https://www.statetrustees.com.au/wp-content/uploads/2015/05/Financial-elder-abuse-report-4-diversity.pdf

[2] Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America, National Research Council (US) panel to Review Risk and Prevalence of Elder Abuse and Neglect, Bonnie RJ, Wallace RB, editors. http://www.ncbi.nlm.nih.gov/books/NBK98784/

(a) has care and support needs;
(b) is, or is at risk of, being abused or neglected; and
(c) is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

Public advocates or public guardians should be able to exercise this power on receipt of a complaint or referral or on their own motion.

The FSC is supportive of providing public advocates with the power to investigate suspected instances of elder financial abuse. We note that this power has been inferred in Victoria alongside a suite of other changes which have facilitated cases of elder financial abuse to be tried. Importantly, where an older person has care or support needs, we suggest the investigation include appropriate requirements for that person to be equipped with formal supported decision-making arrangements.

The FSC agrees that these investigations should be permitted to occur where there is a complaint or a referral by the motion of the advocate.

With regards to public guardians, the FSC broadly agrees that public guardians should be provided with greater avenues for addressing issues of elder abuse. We suggest that the nature of these avenues and the appropriate inference of powers are best informed by groups representing public guardians.

Proposal 3–3 Public advocates or public guardians should have the power to require that a person, other than the older person:

(a) furnish information;
(b) produce documents; or
(c) participate in an interview

relating to an investigation of the abuse or neglect of an older person.

The FSC agrees with Proposal 3-3 with reference to the points made in the response to Proposal 3-1.

To the extent that public advocates and guardians are or will be reliant on reporting, it will be important to have clear guidelines particularly for financial institutions including:

- To which entity the report(s) should be made;
- The circumstances which would generate a report; and
- The information to be imparted.

From the perspective of the FSC, this reform is fundamentally related to Proposal 3-5 (and the accompanying protections).

Proposal 3–4 In responding to the suspected abuse or neglect of an older person, public advocates or public guardians may:

(a) refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;
(b) assist the older person or perpetrator in obtaining those services;
(c) prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or
(d) decide to take no further action.

The FSC agrees with Proposal 3-4, ensuring that the appropriate these activities occur with appropriate transparency and safeguards for the protection of the older person, and that the public advocate and any referred services assure a reasonable level of skills and resources to assist in the particular situation of the older person. This may require checks and balances in the process of referral.

With regards to (a), the FSC suggests that police or other relevant law enforcement bodies should be made aware of the situation and the person being investigated where it is of a particularly serious nature. Responsibility for these notifications and the pathways will also be important for third parties, including financial institutions, depending upon the framework.

Proposal 3–5 Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:

(a) liable, civilly, criminally or under an administrative process;
(b) found to have departed from standards of professional conduct;
(c) dismissed or threatened in the course of their employment; or
(d) discriminated against with respect to employment or membership in a profession or trade union.

The FSC agrees with Proposal 3-5.

Additionally we note that the implementation of a reporting mechanism of this nature should adequately protect the individual by ensuring ease of access, clarity of reporting, appropriate data collection and protection of the disclosing individual and all vulnerable persons. This may be in the form of a providing a helpline, online form, or designation of reporting to particular persons i.e. bank manager, doctor, lawyer. The FSC note that guidance for the form of these protections may be found in existing whistleblower protection rules.

Proposal 5–2 The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.

The FSC broadly agrees with Proposal 5-2, however it should be noted that some legal practitioners will prepare two EPAs to take place on specific instances. For example, document A may appoint a spouse to commence immediately; document B may appoint children to act once the spouse is unable to act (i.e. illness; death). There needs to be clarity around which enduring documents override others, and which operate simultaneously.

Proposal 5–3 The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents can be registered and that unregistered enduring documents remain valid for a prescribed period.

The FSC agrees with Proposal 5-3 regarding the transitional arrangements for implementation of a national online register. With regards to the terms of the proposal, we also suggest that after the end of the prescribed period, any unregistered EPA should still have a means to be registered and then become valid again. This will ensure that people are not disadvantaged if they are not aware of the changes and reduce compliance costs on trustee companies and/or legal practitioners who may be holding hundreds of POAs.

In relation to this proposal, we note that the development of a national register requires extensive consideration of a range of transitional issues. In order to undertake this process effectively, we believe several short- and medium-term activities are required.

The FSC agrees that the ideal long-term scenario for the management of EPA instruments employs the use of a national register. However, in order for such a register to be effective, it must be developed cooperatively by States and Territories and take into account the myriad ways in which the instruments are used and misused in different jurisdictions.

The FSC recommends that an expert group or consultative committee be assembled comprising representatives from State and Territory Governments with the express aim of harmonizing Powers of Attorney laws nationally. We suggest that this group or committee would oversee a consolidated and inclusive approach towards appropriate reform of POA/EPA laws nationally. We also recommend that this group is appropriately resourced by the Government to oversee range of activities including but not limited to the following:

1. A review of how POA/EPA instruments are implemented, governed and protected by law across the different States and Territories to identify the similarities and differences across jurisdictions.

2. A review of models implemented by different jurisdictions in order to address elder abuse and an evaluation of the successes and challenges of those methods.

3. With reference to the information gained from the above two exercises, a plan for the harmonization and standardisation of POA/EPA laws – possibly creating a National Enduring Powers of Attorney instrument - across jurisdictions. The harmonization of laws will need to account for how terms are used in jurisdictions that have implemented effective legal responses to elder abuse.

4. Clearly determining the most effective legal mechanism/s to be used in implementing the nationally harmonized laws and developing a plan for how the process of harmonization will take place including appropriate timelines and resources.

5. Clearly determining the requirements of a national register, including safeguards and accessibility, and any potential models of existing registers that should be used. This should include determining how State and Territories' EPA information will feed into this national register and how it will be maintained with appropriate protections and accessibility.

The FSC acknowledges that the above list of actions are only a starting point and that further information will come from State and Territory representatives and other authorised professionals. However, we strongly encourage the development of a group or committee to inform this process. Without due considerations and evidence-based policy, a preemptive national register for POA/EPA may be ineffectual in addressing the issues that currently exist in this space. Rather, we are supportive of a paced and systematic approach towards the reform of POA/EPA that is guided with the input of relevant parties.

The FSC also encourages clarity around whether any reforms to POA/EPA laws nationally would be implemented through the Council of Australian Governments or the Attorney-General's department.

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

The FSC acknowledges that a range of different parties will require access to the national online register. This necessitates particular safeguards and functionality to ensure that users are only able to access the information relevant to their professional capacity, rather than to create an open source database of information.

One way in which these particular access requirements could be facilitated by a register would be to allow EPA instruments to include a provision for the registration number. Those searching the register are then able to use this registration number to verify the donor's name and date of document to confirm its validity. By example, the register could operate similar to the Victorian Working With Children checks where an organization can enter key details from a card to confirm that it is current.

Access to the register ideally will align with the responsibilities and authorities inferred under State law. It is expected that, for example, medical professionals will be able to access particular records regarding medical POAs, whilst financial institutions would be able to access particular records regarding financial POAs. The register would need to be able to facilitate this access, ensuring appropriate checks to verify the authenticity of the identity of the user, and provide specific information as is relevant to that user.

Public trustees and guardians, particularly in their roles to ensure the legitimate management of estates belonging to vulnerable and incapacitated peoples, are expected to have wide access to the register. The feedback that the FSC has most frequently received from trustees with regards to elder financial abuse is that difficulty in identifying and verifying authentic POA instruments, and an inability to refer suspicious behaviour by POAs further, is a significant contributor to the prevalence of instances of misuse and abuse of the instruments. As such, it is paramount that a register considers the access needs of trustees in its development.

Police and legislated governance authorities related to the public good are expected to have unfettered access in the course of investigations.

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 FSC agrees that public advocates and public guardians should have the power to conduct random checks of enduring attorney's management of principals' financial affairs. However, appropriate governance mechanism, including parameters around appropriately informing POA of such potentialities, must also be implemented.

Proposal 5–4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:

(a) legal practitioner;
(b) medical practitioner;
(c) justice of the peace;
(d) registrar of the Local/Magistrates Court; or
(e) police officer holding the rank of sergeant or above.

The FSC agrees with the principles of Proposal 5-4. However, we note that any increased restrictions on witnessing requirements must also ensure appropriate safeguards so as not to penalize either the principal or the POA unduly.

The FSC suggests that more restrictive witnessing requirements must necessarily be accompanied by legal avenues which ensure that where an instrument has inadvertently failed to comply with the requirements, for example due to a misunderstanding by one of the parties involved or due to an unforeseen or emergency situation, there are means to secure appropriate validation. These means should ensure that the spirit and intention of the requirements, particularly in ensuring the capacity of the principal in making the decision to create the instrument, should be upheld.

In Victoria, similar reforms to the POA witnessing requirements were accompanied by the inference of powers to the Victorian Civil and Administrative Tribunal to dispense of the requirements in situations where the full court of the Tribunal felt it was appropriate. This is one legal model that may be appropriate[3].

We also note that the list of appropriate witnesses should be informed on an ongoing basis to ensure that the representatives are reflective of the nature of authorities accessible to vulnerable peoples in various communities. Potentially the list would need to be widened to include local council representatives, public notaries, or those able to witness an affidavit, in order to facilitate ease-of-use.

Any changes to witnessing requirements must be careful not to make the process too onerous as to deter POAs from wanting to be appointed, or deter principals from creating appropriate POA instruments. This is paramount in ensuring that the public response to elder financial abuse consists of a greater uptake of appropriate protective legal instruments, rather than a decline.

Further, such reforms must be informed by the experience of professionals dealing in POA instruments in each jurisdiction, acknowledging the differences in the ways that instruments are accessed, governed and managed across each State and Territory.

Proposal 5-4 continued:

[3] Victorian Powers of Attorney Act (2014), Section 116, Sub-section 1. Paragraph (b).

Each witness should certify that:

(a) the principal appeared to freely and voluntarily sign in their presence;
(b) the principal appeared to understand the nature of the document; and
(c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

The FSC agrees with the above continuation of Proposal 5-4. Points (a), (b) and (c) above, broadly encapsulating the need for witnesses to capacity-test the principal, which are a critical safeguard by the witness.

In the experience of FSC members, witnesses – including legal practitioners and medical practitioners – are not consistently experienced in how to capacity-test the principal when applications are made for POA instruments. As such we suggest that special attention is paid in the National Plan to provide resources and training in capacity-testing for all categories of witnesses.

Proposal 5–5 State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person's failure to comply with their obligations under the relevant Act.

The FSC agrees with Proposal 5-5. We recommend that such orders be subject to due process and reasonable accommodations for individuals acting with best intent and reasonable care. Sanctions should be applied only where the tribunals establish a failure, through malicious action, fraud, or serious maladministration, to take a reasonable standard of care.

Proposal 5–6 Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney), unless:

(a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
(b) a tribunal has authorised the transaction before it is entered into.

The FSC agrees with Proposal 5-6. We note that the form of the authorization referred to needs to be clarified and the requirements for obtaining that authorization must have adequate safeguards to protect the principal.

Proposal 5–7 A person should be ineligible to be an enduring attorney if the person:

(a) is an undischarged bankrupt;
(b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);
(c) has been convicted of an offence involving fraud or dishonesty; or
(d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

The FSC broadly agrees with Proposal 5-7. We note that:

- In relation to points (a) to (c), where the principal of the power states in the independently witnessed EPA that they have been informed of the bankruptcy/prohibition/conviction, they should be permitted to proceed.

- In relation to point (d) where the attorney is a member of the immediate family of the principal, they should be permitted to proceed.

Proposal 5–8 Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:

(a) making or revoking the principal's will;
(b) making or revoking an enduring document on behalf of the principal;
(c) voting in elections on behalf of the principal;
(d) consenting to adoption of a child by the principal;
(e) consenting to marriage or divorce of the principal; or
(f) consenting to the principal entering into a sexual relationship.

The FSC broadly agrees with Proposal 5-8. We note that consideration of input from appropriate professionals working in the area of legal consent with regards to the above, in particular (f) for adults, is required. However, we agree in principle to the intent to restrict the capacity of an enduring attorney to expand their own powers without some additional oversight/authority.

With regards to (c), we note that there needs to be clarification and specification as to the type of elections being referred to. For example, SMSF Trustees (and their attorneys) may have voting rights for listed entities.

The FSC also notes the possible inclusion of a No Resuscitation/Medical Enduring Power of Attorney to be included in this list i.e. the person must separately make any Medical Enduring Powers directly.

Proposal 5–9 Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.

The FSC agrees with Proposal 5-9.

Proposal 5–10 State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.

The FSC agrees with Proposal 5-10.

We note that achieving nationally consistent laws necessarily involve a process of harmonization of existing laws to ensure consistency of terms and use. Further, harmonisation between POA and EPA instruments across jurisdictions needs to be an important consideration in this process. Clear and consistent requirements relevant to each of these instruments in

each jurisdiction are critical to their efficient and effective use.

Please note the comments regarding POA harmonisation in the response to Proposal 5-1.

7. Banks and superannuation

Proposal 7–1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.

The FSC notes that the Financial Ombudsman Service recently identified the Australian Bankers Association guidelines on elder abuse as best practice. We also note that the current review of the Code of Banking Practice is considering revisions that will encompass appropriate actions by banks in cases of elder financial abuse. As such, we do not support any prescriptive changes to the Code of Banking Practice as noted in Proposal 7-1.

Whilst financial institutions should have adequate guidance on how to report incidents in line with privacy and confidentiality requirements, the manner in which the institution implements appropriate safeguards will vary based on the institution. Many financial institutions have their own guidance documents that are used to ensure the protection of vulnerable clients in financial transactions specific to their client relationship. The FSC notes that such models are successful precisely because they are developed by the institution and therefore address the specific way in which the institutions services are dispensed.

Current data does not suggest that mandatory reporting in the form of additional disclosure by financial institutions provides any benefit in the absence of greater access to data, avenues for redress, consumer and community awareness and legislative penalties.

Rather, the FSC encourages adequate protections for financial institutions reporting incidents, as well as government guidance regarding appropriate reporting avenues.

Question 7–1 Should the *Superannuation Industry (Supervision) Act 1993* (Cth) 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?

The FSC notes that there are significant obligations imposed on both individual trustees and corporate trustees responsible for self-managed superannuation funds under Superannuation law. While there is growing acknowledgment that the industry is increasingly responsible for

identifying the gaps that exist and ensuring that appropriate safeguards are in place, to our knowledge, the FSC is not aware of evidence to support reforms of the nature proposed in 7-1.

- In the event that the trustee loses capacity, we note that there are a number of arrangements that take place. This includes the use of Enduring Power of Attorney instruments where a trustee loses capacity, and processes to legally enlist replacement Powers of Attorney where no powers exists.

- In the case that no viable person can be appointed, the Trustee and Guardian can be appointed by a court or tribunal to provide direct financial management services for people who become incapacitated. Anyone who has a genuine concern for the welfare of a person having serious difficulty managing their own affairs is able to make an application to the courts or, which can include close family members through to aged care providers or doctor. Alternatively, the fund can be wound up or transferred to another super fund if the Public trustee does not deem the SMSF compliant, or necessary to manage.

- Significant obligations are imposed on those in individual trustee roles and on those serving as a Director of a corporate trustee. Under the SIS Act, codified obligations include the duty to act honestly, act in the best interest of the trustee, and to keep the funds separate from other money assets. Further the trustee act and corporations act also prescribes an extensive fiduciary element within the trustee-member relationship. Where an individual steps into the role of the trustee via an Enduring POA instrument, they are required to sign an ATO declaration that sets out the trustee obligations, declaring that they will act honestly and in the best interests of the members. Trustees are also subject to auditor reviews to ensure that the trustee is acting within the required rules. Where these rules are breached, the auditor reports the trustee to the ATO. This is a further safeguard that exists in the current process.

The FSC thus believes there are sufficient safeguards and compliance obligations on trustees and directors to undertake these responsibilities when they are not members of the fund.

With regards to the Superannuation Complaints tribunal, the FSC notes the existing decision by the Cooper Review which noted that granting greater jurisdiction to the SCT would not result in greater efficiencies. Additionally we note that there are court pathways, credit and investment ombudsmen services and the Financial Ombudsman Service, which exist as avenues for redress for dispute resolution in SMSF. Rather, we note that increasing powers for trustee and guardianship tribunals to hear cases of elder abuse may assist in facilitating redress in SMSFs where necessary. The FSC therefore does not support an expansion of the SCT jurisdiction as per Proposal 7-1 (d).

Proposal 9–3 The *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.

The FSC agrees with Proposal 9-3. We note that a person appointed under an Enduring Power of Attorney should only be able to make or renew a Binding Death Benefit Nomination on

behalf of a member if expressly authorized to do so by the Enduring Power of Attorney.