



CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

9 March 2017

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Submission made via Australian Law Reform Commission website

Dear Sir/Madam,

Submission – Discussion Paper 83 – Elder Abuse Inquiry

Chartered Accountants ANZ welcomes the invitation to make a submission to the Australian Law Reform Commissions above inquiry.

CA ANZ strongly supports measures to ensure that older Australians can live their lives with dignity, safety and security especially financial security.

Many of our members deal with older Australians and their families on a daily basis about their financial and related matters and the problems some older citizens face has long been on our organisation's radar.

The majority of this submission relates to some of the changes to financial and superannuation laws proposed by the Commission in its elder abuse discussion paper released in December 2016.

Proposed Changes for Enduring Powers of Attorney (EPoA)

General Powers of Attorney (GPoA)

At paragraph 5.22 of the Elder Abuse Discussion Paper the ALRC expresses the view that "... there appears to be less evidence of general powers of attorney being abused. The key safeguard available in respect of general powers of attorney is the ability of the principal to revoke the power at anytime."

It is our view that the powers conferred by both GPoAs and EPOAs can be equally abused.

In many cases the principal of any executed GPoA or EPoA is unaware their attorney has stolen their money or other assets or acted unethically until well after the event.

Consequently, we think any reforms made to EPoAs to protect a principal should also be made to GPoAs.

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National On-line Register

We are not opposed to the concept of an on-line register and believe it could have many useful outcomes including the potential to reduce misuse of these documents. We are however concerned about its potential cost to consumers and small business simply because they wish to complete transactions with greater flexibility.

Additional Matters In Relation to Powers of Attorney documents

It remains the case that because of bad experiences some government departments – in all jurisdictions – and other public and private organisations or entities (such as financial institutions) choose to refuse to accept any Power of Attorney document.

We are aware of situations where individuals have appointed an attorney correctly, in order to complete a transaction – for example, purchase real estate or take out a loan – only to have another party to the transaction refuse to accept the attorney and the principal's appointed representative.

Whilst we accept that entities should be free to determine how they complete business some individuals need a mechanism whereby they can easily find out which entities will accept or reject such documents.

Enhanced Witnessing

We agree with the need for EPOAs to be signed by a range of independent witnesses and the list of professionals nominated by the ALRC in Proposal 5-4. However we believe that one of the professional witnesses could be members of Chartered Accountants Australia & New Zealand or CPA Australia who hold a current Certified Practising Certificate with either organisation.

Prohibited Decisions

We agree with the list of prohibited decisions proposed by the ALRC however believe that this list should:

- also apply to GPoA
- include the ability to execute any death benefit nomination for superannuation funds.

Other ALRC Power of Attorney proposals

We agree with the following ALRC proposals:

- 5-5: Compensation
- 5-6: Restrictions on conflict transactions
- 5-7: Ineligible person
- 5-8: Prohibited decisions
- 5-9: Record keeping
- 5-10: Consistent laws across all jurisdictions

Banking and Superannuation

Proposal 7-1

We agree with this proposal but suggest that it should apply to all financial services organisations regulated by APRA. It is likely that all these organisations will hold the Australian Financial Services Licence. Mechanisms to protect older Australians from financial abuse could be imposed via APRA, ASIC and member associations.

Proposal 7-2 – Authorizing third parties to operate bank accounts

We agree with this proposal however we believe that those witnessing any signatures should not be a related party – that is, they should not be relatives, close business associates or an employee of the other party.

Question 7-1 – Various amendments to the *Superannuation Industry (Supervision) Act 1993* in relation to Self Managed Super Funds (SMSFs)

Before we discuss the questions proposed by the ALRC in relation to SMSFs, we will comment on an issue discussed in the Elder Abuse paper about SMSFs.

Firstly, in paragraph 7.45 of the paper it is stated that “evidence suggests that there is a high prevalence of SMSFs being used as part of a family business structure, typically with the business premises owned by the SMSF and leased to the family business.” We acknowledge that some SMSFs are used in this way, we however point out that according to the latest ATO annual statistics commercial property made up approximately 11% of all SMSF assets and are owned by just over 14% of all SMSFs.

Secondly in footnote 96 it is stated that, “The Commonwealth’s powers in relation to taxation, financial institutions, social security and superannuation arise from the banking, social welfare and (sic) powers respectively ...” We wish to point out that the Commonwealth’s legislation governing superannuation – the *Superannuation Industry (Supervision) Act 1993* – relies on the old age pension and corporation powers.

We address each of the suggested sub-questions in Question 7-1 in turn:

(a) Should all SMSFs have a corporate trustee?

Chartered Accountants ANZ has advocated for this change for many years and warmly welcome the ALRC’s suggestion that this change be made. However this policy change needs to be properly implemented. At the very least we believe the following items would need to be addressed to ensure that such a massive modification in the operation of many SMSFs were practically possible:

- Consideration should be given to requiring that a SMSF corporate trustee must be a sole purpose entity – that is, it cannot have more than one purpose such as running a business or acting as a trustee of another trust. This is currently possible under the existing laws
- When establishing a new corporation, a range of fees will be incurred such as ASIC establishment fees, and professional fees charged by an accounting or legal practice. In addition, ASIC charges an annual filing fee which is \$47 for a special purpose company and \$249 for other proprietary entities (discounts are available for corporations that choose to pay these annual filing fees ten years in advance). All these costs – together with the requirement to complete an annual ASIC company review even when its fees have been paid in advance – are a major disincentive for SMSFs to use a corporate trustee. In our view all these issues would need to be addressed before insisting that SMSF trustees be a company.
- The current process of moving from individual to corporate trustees can be expensive, time consuming and deeply frustrating. Depending on the assets held by a SMSF the following fees may apply for changing the ownership of fund assets:
 - State or Territory filing fees for changing land titles
 - Fees, charges or penalties imposed by financial institutions such as, banks, stock brokers and share registries
 - Amending lease documents

In addition the administrative process and documentary proofs required to change the owner of a trust asset – for example, a bank account or term deposit – will vary greatly from one entity to another. A common process with the same proofs would be required to be provided enmass to corporate trustees

We are of the view that unless the above matters are addressed it is highly likely that any mandatory change from individual trustees to corporate trustees for SMSFs will face stiff resistance from many people involved in the SMSF sector

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

We believe this concept deserves consideration but any changes need to be carefully thought through and drafted so that unintended consequences are not introduced

- (c) Impose additional compliance obligations on trustees and directors when they are not a member of the fund

Similarly to our comment above, we believe this concept deserves consideration but care needs to be exercised in drafting any changes to avoid unintended consequences

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

In broad terms we do not support this idea for disputes between members and trustees/directors if they are all the same individuals. SMSF trustees, members and other beneficiaries should be permitted to seek compensation or redress in a number of circumstances that at present can only be solved by initiating formal legal proceedings. For example, complaints about poor or malfeasant administration or a fund or member benefit. These complaints can sometime be heard by financial services complaints organisations such as the Financial Ombudsman Service. In all matters SMSFs should be permitted to complain to a non-superannuation complaints body.

Question 7-2 – Should there be restrictions as to who may provide advice on, and prepare documentation for the establishment of self-managed super funds

While not perfect, we believe the current system works well and does not need to be adjusted.

At a practical level we do not believe, as stated in paragraph 7.66 of the Elder Abuse paper, that poor quality SMSF documentation facilitates “abuse in the context of loss of decision-making ability”. We believe this abuse would occur regardless of the terms of a super fund’s trust deed.

In paragraph 7.65 the Elder Abuse paper says:

- “It has been suggested by a number of advisers in the SMSF sector that most documentation for the establishment of SMSFs are off-the-shelf products, including standard trust deeds and corporate constitutions.” This is not unique to the SMSF sector. It is also quite common in many areas including company constitutions for proprietary entities, small to medium public entities and many different types of trusts.
- “Many of these documents do not properly provide for succession events on loss of capacity by a trustee.” Whilst this may have been a problem more than a decade ago we believe that the drafting of SMSF deeds has improved in the intervening period and many would cater for this issue in some way or another.

- “This creates a number of problems as outlined above, which heighten an older person’s risk of financial abuse. The adequacy and currency of SMSF trust deeds is currently not scrutinised at all, either by the ATO, or the approved auditor.” The Tax Offices’ role in relation to SMSFs is to ensure that funds comply with the superannuation laws and all relevant Commonwealth tax laws. In short, the ATO is not a prudential regulator. In addition, it is currently not the role of approved auditors to scrutinise SMSF trust deeds except to ensure that a trustee has complied with their deed.

Consistency in terminology

We strongly support the ALRC’s comment in its concluding paragraph of Chapter 7 that there needs to be “consistent terminology for decision-making ability”.

Superannuation Death Benefit Nominations

Proposal 9-2 – the witnessing requirements for binding death benefit nominations in the SIS Act and its regulations should be equivalent to those for wills

We support this proposal but would like to see it taken a step further. We believe that this requirement should apply to all death benefit nominations – trustee discretionary, lapsing binding nominations and non-lapsing nominations. This issue is particularly complex for SMSFs and does need to be simplified.

Proposal 9-3 – the SIS Act and its regulations 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 fund member

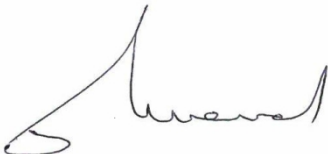
We agree with this proposal unless the power has been specifically given in the attorney’s appointment. In addition we would also include a person appointed under a general power of attorney in this prohibition unless the power had been specifically granted.

Electronic and Digital Signatures

We believe that in relation to elder abuse the ALRC should also consider how older Australians could be vulnerable to the misuse of any electronic or digital signature.

Should you require any further information or wish to discuss the contents of this submission, please contact Tony Negline, Head of Superannuation on 02 8078 5404 or by email at tony.negline@charteredaccountantsanz.com.

Yours sincerely,



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About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members of Chartered Accountants Australia and New Zealand are known for their professional integrity, principled judgment and financial discipline, and a forward-looking approach to business.

We focus on the education and lifelong learning of members, and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents 788,000 current and next generation accounting professionals across 181 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications to students and business.