19 December 2017

National Financial Literacy Strategy
Australian Securities & Investments Commission

Email: submission@financialliteracy.gov.au

Dear Madam/Sir,

SMSF ASSOCIATION SUBMISSION ON NATIONAL FINANCIAL LITERACY

The SMSF Association welcomes the opportunity to make a submission on the Australian Securities and Investment Commission's (ASIC) consultation paper regarding National Financial Literacy.

We are very supportive of improving the financial literacy of the Australian public especially given that the Association's core focus is to raise the standard of advice provided by all SMSF professionals and enable trustees to become better educated and make informed decisions for their retirement.

We believe superannuation and retirement is an important part of financial literacy and advocate that the National Strategy looks to ensure a greater focus on this area. We believe that superannuation and retirement issues are and will continue to play a significant part in shaping people's financial outcomes throughout their life.

ASIC Proposal P1 - We propose to update the language of the National Strategy from 'financial literacy' to 'financial capability'.

P1.1: The SMSFA does not support this proposal.

P1.2: The Association understands the notion that 'financial capability' may better reflect current ASIC initiatives and better support intended outcomes but we have concerns that the term is not as well understood as financial literacy.

We believe it is clear that 'financial literacy' is a combination of financial knowledge, skills, behaviours and personal circumstances which can improve financial wellbeing. Inherent in this, is the fact that if an individual is financially literate it encompasses their knowledge of how capable they are to make appropriate decisions based on their personal financial circumstances.

Additionally, we believe that that the broader public do not understand what 'financial capability' means. It may be taken as a narrow interpretation meaning that if you have sufficient financial resources then you are financially capable. This has no reference to how much knowledge you have about how to utilise that money. Accordingly, we are concerned that using the term financial capability may be confusing and unclear to people outside financial services.

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Therefore, we recommend keeping the term 'financial literacy' on the basis that knowledge is the most important and powerful factor in determining someone's ability to make sound financial decisions. 'Financial literacy' is also very easy to understand based on plain reading of the words. An individual does not need too much, if any, research into the term because it is self-explanatory. It has also been used successfully by organisations for many years resulting in a greater general awareness by the public.

The Association alternatively proposes that the language of the National Strategy could update its language to 'financial literacy and capability'.

ASIC Proposal P2 - We propose to extend the timeframe of the next National Strategy to up to 10 years.

P2.2: Agree, with appropriate reviews at a mid-point.

ASIC Proposal P3 - We propose that the 2018 National Strategy will emphasise the following core behaviours that support improved financial capability:

(a) managing money day-to-day:

(b) planning for the future; and

(c) making informed decisions.

P3.1: We agree with the proposed core behaviours and have expanded on point (b) below in the discussion sections.

We believe planning for future especially through understanding and engaging with superannuation is extremely important going forward as the superannuation system matures.

D2.2 How could initiatives aligned with the National Strategy strengthen the capabilities of professional practitioners and intermediaries to assist Australians with money matters and financial decision making?
D3.1 When updating the National Strategy, what emerging opportunities should be considered?
D5.1 How could we encourage more organisations to get involved with the National Strategy?

The Association believes there is an emerging opportunity to engage individuals through the promotion of effective financial advice.

We strongly believe in the economic and social benefits that financial advice provides to the Australian population. Going forward it is now an appropriate time and opportunity to rebuild and enhance confidence in the sector with the endorsement of industry support. The introduction of the Financial Adviser Standards and Ethics Authority (FASEA) which will govern the conduct of professionals in the financial advice sector by establishing mandatory educational and training requirements from 1 January 2019 will strengthen this claim.

The utilisation of financial advice is a significant way to foster the growth in Australia's financial literacy and capability. Currently there is a gap between community perceptions of financial advisors

and the benefit they provide. With support from the National Strategy, there is opportunity to build trust and confidence in the value of advice and increase the financial literacy and capability of the nation.

With the increasing importance and prevalence of financial technology companies there is also the opportunity to utilise 'robo' advice to increase financial literacy and capability as well. 'Robo' advice has the potential to provide help to a further range of Australians due to its ability to be wide reaching and its cost effectiveness. This is especially relevant for people who may not be seeking specific product advice but are in need of strategic advice. Over the next ten years, this market will continue to grow as advice offerors streamline their processes to be more personalised and effective.

D3.2 Are there issues that might require greater emphasis in the 2018 National Strategy?

As the paper states, the Association is supportive of the promotion of planning for the future. We believe that setting and working towards savings goals, understanding and engaging with superannuation and planning and investing for retirement are extremely important messages to be conveyed.

As superannuation will potentially be an individual's largest or second largest asset it requires emphasis in all financial literacy and capability messages. We are now also in the stages of superannuation system maturity where the majority of the workforce going forward will have at least 15-20 years of compulsory superannuation contributions. Accordingly, the importance of people understanding and engaging with their superannuation is increasing.

However, the increased casualisation and growing "gig" or freelance nature of work arrangements for many people will see them excluded from compulsory superannuation contribution arrangements and will require engagement more focused on voluntarily saving for retirement. Improving engagement with superannuation and planning for the future is very important for such workers.

Across the broader population, no matter what their work arrangements are, we believe there is a strong message about choice, consolidation and engagement with superannuation that ties in with the current Productivity Commission review into the superannuation sector and the Government's recent superannuation reforms.

For example, one such issue which was highlighted by the Senate Inquiry into 'Achieving economic security for women in retirement', is that the average superannuation balance of women at retirement is about half that of men. Highlighting such issues will give the National Strategy the potential to educate the public and address important ongoing issues over the extended timeframe.

Emphasising engagement will help future generations be able to better self-fund their retirement. Early financial literacy and capability of one's superannuation has the potential to increase individual's retirement income and this should not be underestimated in any financial literacy and capability strategy going forward.

D3.3 What are the potential challenges to be considered in the 2018 National Strategy?

The Association agrees that financial abuse is a potential growing challenge for the 2018 National Strategy. We have made a submission to the Australian Law Reform Commission regarding Elder Abuse which is referenced as part of the National Strategy's key financial abuse considerations. We have attached our submission below which highlights the key concerns around preventing elder abuse in context of SMSFs.

Most relevant is our support for comprehensive and targeted public awareness education on elder abuse which will be beneficial in providing a framework for action, performance indicators and appropriate oversight for reform similar to recent family and domestic violence campaigns.

A proposal to improve the financial literacy of older Australians, especially with respect to wills and powers of attorneys, will be integral in reducing the possible exploitation of older members of our community. Considering Australia's aging demographic, and the larger population base of SMSF members who are of an older age, we believe this is important.

If you have any questions about our submission please do not hesitate in contacting us.

Yours sincerely,

John Maroney
Chief Executive Officer
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak professional body representing SMSF sector which is comprised of over 1.1 million SMSF members who have $701 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.

ATTACHMENT

SMSF ASSOCIATION FEEDBACK ON THE AUSTRALIAN LAW REFORM COMMISSION'S ELDER ABUSE DISCUSSION PAPER

The SMSF Association (SMSFA) welcomes the opportunity to contribute to the Australian Law Reform Commission's (ALRC) elder abuse discussion paper. As the peak body representing the SMSF sector, we believe we can provide the ALRC with important insights into SMSFs and make some policy recommendation that can reduce the merging risk of elder abuse.

We are aware of the current dangers emerging from the ageing population and cognitive decline which may make elderly superannuation fund members more vulnerable to financial abuse. The loss of capacity does make members potentially more susceptible to be defrauded or taken advantage of. Nevertheless, we believe it is important to acknowledge that SMSFs are in the vast majority of circumstances are an effective and efficient retirement savings vehicle for older Australians, even where an SMSF member may have lost capacity to be a trustee of the fund. However, the existing regulation of superannuation funds could be adjusted to reduce risks of elder abuse.

We think there are **two key** risks involving elder abuse – agency issues and fraud:

- Agency issues can occur where substitute trustees may not act in the best interest of the SMSF member, for example, poor investment decisions/strategy, thinking of preserving inheritance or withdrawing too much now for their own use, poor compliance, etc.
- Fraud may happen when substitute trustees are given access to SMSF bank accounts and are able to commit fraud without the SMSF member being aware of the relevant transactions.

Furthermore, these risks are exacerbated by the recent legislation changes to superannuation which impose a $1.6 million pension cap from 1 July 2017. This change will potentially result in larger lump sums of money having to be removed from the super system. This may make older Australians more vulnerable to elder abuse as decisions will need to be made about how their superannuation savings are dealt with.

The SMSFA is supportive and committed to measures that will help prevent and safeguard against elder abuse. However, we believe that an important distinction between elder abuse and the loss of capacity must be noted. The SMSFA understands the interconnected nature of the two concepts but it is not always the case that these concepts are always linked. Loss of capacity of a trustee does expose them to a higher risk of elder abuse as a non-member trustee or director of a corporate trustee company must be included in the SMSF structure. (A similar result can occur where a member of an SMSF dies and the remaining member, usually a spouse, has not had an active role in running the fund). This can result in the member who has lost capacity not having their best interests followed by a non-member trustee.

At the same time, we believe it is important to acknowledge that there are many SMSFs where through quality financial advice and appropriate legal structure, an SMSF can continue to meet a member's

needs where they have lost capacity. In these situations an enduring power of attorney (EPOA) and non-member trustees can be used to ensure appropriate actions are taken on behalf of the trustee/member.

We believe many of the SMSF proposals detailed in the report focus on a loss of capacity or cognitive ability of trustees which necessarily don't infer elder abuse. However, we acknowledge that some of the proposals may potentially help the SMSFs more generally deal with issues caused by loss of capacity of an SMSF trustee. Consequently, these proposals may reduce risks of elder abuse in the SMSF sector.

Further, in addition to changes to superannuation and related laws, the areas of loss of capacity and estate planning are not always fully understood by SMSF trustees. The proposals we have agreed with, and where we have made alternative suggestions are what we believe to be sensible safeguards for an emerging risk but stress that greater awareness and education regarding elder abuse are also a crucial policies.

While the SMSFA supports and proposes some "tweaks" to legislation we also warn that additional and stronger legislation may not result in increased protections from elder abuse, in the same way existing stringent *Superannuation Industry (Supervisory) Act 1993* (Cth) (SIS Act) and *Superannuation Industry (Supervisory) Regulations 1994* (Cth) (SIS Regulations) provisions, and existing common law and fiduciary duties may not always stop elder abuse. Offenders who are willing to defraud an older person for financial gain are unlikely to be deterred by these laws. This is why we believe that the banking industry and specifically bank withdrawals should be considered as the first point of attack in the prevention of elder abuse especially with regards to SMSFs with large sums of money held in bank accounts.

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

The SMSFA supports the proposal that a National Plan to address elder abuse be developed.

We are supportive of a holistic approach to the issues of elder abuse but stress more information is still needed. We believe a comprehensive and targeted public awareness education on elder abuse will be beneficial to provide a framework for action, performance indicators and appropriate oversight for reform similar to recent family and domestic violence campaigns. It will also promote respectful intergenerational relationships and responses to elder abuse.

A proposal to improve the financial literacy especially with respect to wills and powers of attorneys will be integral in reducing the possible exploitation of older SMSF members. Considering Australia's aging demographic, and the larger population base of SMSF members who are of an older age, we believe this is important.

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

The SMSFA supports the commissioning of a national prevalence study of elder abuse. The limited understanding of the prevalence of elder abuse supports the need for systematic research and a solid base of empirical understanding.

Proposal 5-1 A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

The SMSFA supports the establishment of an online register for enduring documents and the orders of appointments for guardians and financial administrators. We believe that a register would ensure only one enduring document can be registered at any one time preventing an attorney attempting to rely on an enduring document that has been revoked. It will also prevent potential SMSF trustees attempting to arrange a subsequent enduring document in circumstances where there is a question to the cognitive ability of an SMSF trustee.

Proposal 5-2 The making or revocation of an enduring document should not be valid until registered.

The SMSFA supports this proposal as a sensible ruling with regard to the national register. It is essential the register should be the centralised point of use for EPOAs if a national register was established. This proposal allows others to easily establish the authenticity and validity of an enduring documents.

Proposal 5-7 A person should be ineligible to be an enduring attorney under certain circumstances

The SMSFA would like to note that similar legislation is in place in the section 120 of the SIS Act which has worked extremely well in the superannuation environment. Persons who are bankrupt, convicted of an offence involving dishonesty, subject to a civil penalty order or disqualified by the commissioner of taxation cannot be a SMSF trustee. This has resulted in SMSF trustees who are fit for purpose for the stringent requirements placed on an SMSF trustee.

We believe that similar restraints should be made for EPOAs generally and also that section 120 could be amended to make it clear that an individual who would be regarded as a disqualified person under section 120 of the SIS Act cannot hold an EPOA for an SMSF trustee.

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;

The SMSFA completely agrees with the notion that corporate trustees are best practice but we do not support mandating this requirement. Freedom of choice is a key factor in people choosing to have an SMSF and while we believe that corporate trustees for SMSFs are best practice, we do not support curtailing choice for those who believe that an individual trustee may best suit their circumstances.

We also note that a corporate trustee does not in itself prevent elder abuse, nevertheless they can provide greater certainty in outcomes where a trustee loses capacity, reducing risks of elder abuse. On the death or loss of capacity of a member actions and decisions must be taken regardless of whether individual trustees or a corporate trustee is in place. It is the SMSF's trust deed which is key to determining what actions a trustee or director may take, as it may give ultimate control to a surviving trustee or director which can be abused in either scenario as per *Ioppolo & Hesford v Conti ([2013] WASC 389)*. An individual trustee can also have a perfectly constructed trust deed and be safeguarded from elder abuse without the need for a corporate trustee. While corporate trustees have key advantages such as administrative efficiency and the ability to have a sole member, these don't necessarily offer absolute protection from elder abuse.

The Super System Review Panel in 2010 concluded that they were concerned about the large proportion of new SMSFs choosing not to use a corporate trustee. The fact that these statistics have not altered is a worrying trend. Given it is widely accepted by the Australian Taxation Office (ATO) and most professional advisers to be beneficial in almost every factor apart from initial setup and cost it seems that industry consensus and a better standard of advice has not helped.

The SMSF Association does agree a corporate trustee will provide safeguards and protection against elder abuse in SMSFs, but this is not the only benefit as the ALRC has noted. While we do not support requiring SMSFs to have a corporate trustee under the SIS Act we do believe that the use of corporate trustees can be encouraged through regulatory settings. Most notably we believe that the solvable and key issue comes from set up costs of a corporate trustee. We believe that if the Australian Securities and Investment Commission (ASIC) reduced their special purpose corporate trustee fees and 'red tape' in the setup of an SMSF corporate trustee then the trend of SMSFs choosing individual trustees over corporate trustees will significantly fall. It would potentially result in no lost revenue to the Government with an increase in the number of corporate trustees offsetting lower fees and would improve the SMSF industry and safeguards against elder abuse. The SMSFA believes this could be a change that would have a significant benefit.

(b) <u>Prescribe certain arrangements for the management of SMSFs in the event that a trustee loses capacity</u>

The SMSF Association believes there is an area of uncertainty over the arrangements for the management of an SMSF when a trustee loses capacity. Accordingly, we suggest that education for trustees and advisors on planning for the loss of capacity is the first step to reducing risk of elder abuse occurring in the SMSF sector.

The arrangements in the event a trustee loses capacity is in fact already prescribed by the law by nature of its application once a trustee is no longer able to continue as a trustee. The SMSFA is wary that prescribing them step by step in the legislation would be an unnecessary and exhaustive process which would not solve the issues the paper discusses. That is why believe education of trustees and

advisors is a more effective approach would can be developed via the National Plan as supported above.

Currently when a trustee or director loses capacity their legal personal representative must be appointed to the fund in accordance with the SMSF trust deed under an EPOA for the fund to continue. The original trustee will cease to be a trustee of the fund and the legal personal representative would perform their duties as the trustee pursuant to their appointment as a trustee and not as an agent of the member. This is legislated in section 17A(3)(b)(ii) of the SIS Act.

While we do not support prescribing arrangements for loss of capacity we do believe that considering this issue and its ramifications should be more carefully considered and planned for by SMSF trustees and their advisors. Accordingly, the SMSFA proposes that SIS Regulation 4.09 is amended to include that the trustees of the fund should formulate and review regularly the consideration and planning of the loss of capacity and SMSF exit strategy as part of their the investment strategy.

SIS regulation 4.09 is an operating standard for superannuation fund that requires SMSF trustees to formulate, review regularly and give effect to an investment strategy that includes the following items:

a) the risk involved in making, holding and realising, and the likely return from, the entity's investments, having regard to its objectives and expected cash flow requirements;
b) the composition of the entity's investments as a whole, including the extent to which they are diverse or involve exposure of the entity to risks from inadequate diversification;
c) the liquidity of the entity's investments, having regard to its expected cash flow requirements;
d) the ability of the entity to discharge its existing and prospective liabilities;
e) whether the trustees of the fund should hold a contract of insurance that provides insurance cover for one or more members of the fund.

Section 31 of the SIS Act sets out the operating standards for regulated superannuation fund in accordance with the regulations and if these standards aren't complied with section 166 of the SIS Act imposes an administrative penalty on each trustee. Using the operating standards to influence trustee behaviour can provide a great platform for the issue of SMSF estate and succession planning to be addressed.

Our proposed amendment is similar to the recent addition of SIS regulation 4.09(2)(e) that requires trustees to consider whether their fund should hold insurance. This has had great success in putting insurance to the front of every trustees mind and will have the same effect with estate and succession planning. Furthermore, it then becomes a legal requirement that trustees consider estate planning and then this becomes part of the audit standards that SMSF auditors must see evidence of when auditing the SMSF financials each year.

We also believe that the Australian Taxation Office (ATO) can play a role in issuing an SMSF Ruling on how EPOAs are to be used for SMSFs under the SIS Act. SMSF Ruling 2010/2 currently covers the use of EPOAs under sub para 17A(3)(b)(ii) SIS Act including where a trustee has lost capacity. This is a starting point and we believe that a more targeted ruling or a revision of this ruling could be beneficial to the industry. The SMSF Ruling details scenarios and the certain arrangements for when

an SMSF trustee loses capacity and provides a source for trustees and advisors to refer to and provide much needed clarity in this emerging area.

The EPOA register will also provide a role in the event of loss capacity by providing a centralised reporting method for SMSFs with EPOAs. It will provide consistency in creation of EPOAs, and when they are applied.

Finally we propose a simple amendment to the SMSF Annual Return that is lodged with the ATO allowing SMSFs to alert the ATO when an EPOA has been used in the administration of the fund. This can be established by a 'tick box' and will provide a flag to the ATO of which funds may now be at higher risk for elder abuse.

In principle, the SMSFA would support the establishment of replaceable rules for trust deeds that are absent with regards to the loss of capacity and death of a member. Our initial view is that unfortunately the replaceable rules would be very limited in application because the majority of trust deeds will have reference to these events albeit some of them may be too generic or poorly written. In our view replaceable rules should not step in to ideally fix a clause to prevent a risk to elder abuse as this would undermine the importance of the trust deed.

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

There is potentially merit in imposing additional compliance obligations on trustees and directors when they are not members of the fund purely because of the aspect that they are not beneficiaries but we ultimately do not agree with this proposal. The common law principle of a trustee's fiduciary duty to the trust's beneficiary or the *Corporations Act 2001 (Cth)* provides the protection to beneficiaries when a person becomes a director of a corporate trustee; this is the foundation of trustee law. The SIS Act prescribes a number of obligations for the trustee that in essence oblige the trustee to act in the best interests of the member. These include:

- Act honestly in all matters concerning the fund;
- Exercise the same degree of care, skill and diligence as an ordinary prudent person in managing the fund;
- Act in the best interest of all fund beneficiaries.

An ATO declaration is also signed and sent to the ATO which sets out the trustee obligations which helps educate new trustees and act as a safeguard to members. The auditor also reviews and reports contraventions relating to the trustee and ATO every financial year. The auditor review acts as a check and balance mechanism to ensure consistent adherence to the obligations by the trustee.

Therefore we believe education for trustees and directors which are not members of the fund is again the first step in fighting elder abuse. ATO guidance via an SMSF Ruling on who can be an EPOA and what it means for an SMSF will be beneficial in educating the population base. As stated it will clarify the number of different compliance obligations trustees and directors have.

(d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving SMSFs

The SMSFA does not agree with the proposal that the Superannuation Complaints Tribunal (SCT) should be given jurisdiction to resolve disputes involving SMSFs. The SCT, as stated by the Cooper review would not be appropriate for SMSFs due to its cost, the complexity of cases and inefficiencies in the system. It would involve approximately all 577,000 funds to be levied whilst only a few would use the service. Also, the SCT is currently already overwhelmed and allowing SMSFs access may open up the court to minor SMSF complaints that are currently being resolved without the use of a tribunal. In turn, most complex SMSF complaints are areas of family law that are best left to the courts to resolve.

The remedy and recourse for disputes is an issue that the SMSFA believe is extremely important especially with the emerging risk of elder abuse and so action is necessary but it must not be unsystematic. The SMSFA believes if there is to be any access to the SCT it is via a 'user pays' system. This may allow the SCT to provide advice to trustees on request in relation to disputes and enduring powers of attorney without placing a financial burden on the whole SMSF trustee base.

The SMSFA also notes that the 'Review of the financial system and external dispute resolution and complaints framework' Interim Report has indicated that there should be a single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation) to replace the Financial Ombudsman Service and Credit and Insurance Ombudsman and that the SCT should transition into an industry ombudsman scheme for superannuation disputes. Once both new schemes are fully operational, consideration will be will given to integrating the schemes into a single scheme covering all disputes. This highlights a potential opportunity for the SMSF sector to garner greater remedies and recourse from a new centralised body and reduce the impact on SMSF disputes on elder abuse. Again, a user-pays option for an SMSF member to seek recourse the use of a single, financial services ombudsmen including superannuation could be a viable option for dispute resolution.

Question 7-2 Should there be a restriction on who may provide advice on, and prepare documentation for, the establishment of SMSFs?

The SMSFA is aware of the greater reliance on automated and generic document suppliers which have a greater risk of EPOAs, wills, binding death benefit nominations (BDBNs), reversionary pensions and SMSF deeds not being fit for purpose and causing susceptibilities to elder abuse. Despite this, we think it is too restrictive to mandate the establishment of SMSFs to being required to use legal professionals or other services. Ultimately the decision to establish and maintain an SMSF is the trustee's because they want responsibility for the management of their retirement savings. On that basis they are responsible for the creation of their establishment documents and succession and estate planning and this should be free from intervention.

Despite the greater risk of generic documents being produced by suppliers it is not to say that all of these documents are not fit for purpose for all informed trustees, as these documents are generally created by lawyers. A review of generic document suppliers shows that these websites come with

warnings about their documents legal suitability for the user and that legal or financial advice must be obtained. This is despite their claim that they are drafted by a lawyer. This has the potential to be misleading to trustees and have extensive consequences. Anecdotally, we are aware of numerous cases where documents from these suppliers have not stood up to legal scrutiny and have not met the needs of trustees. Accordingly, we believe the effectiveness and suitability of these documents, as well as the need for further legal advice could be made clearer to prospective trustees and advisors when setting up an SMSF.

ASIC considers SMSFs to be financial products, as such anyone giving product advice about the establishment of an SMSF must hold or be a representative on behalf of someone who holds an Australian Financial Services Licence. Additionally, they must satisfy ASIC's training requirements under Regulatory Guide 146 which contains specific SMSF knowledge areas, including estate planning. This ensures that trustees should be getting relevant and clear advice about the documentation that is required for the establishment of an SMSF.

Accountants, which are one of the most important categories of SMSF professionals who advise SMSF trustees (especially regarding establishing an SMSF) no longer can rely on the "accountants exemption" which allowed them to provide advice regarding the establishment of an SMSF, without an AFSL. From 30 June 2016 accountants are no longer allowed to provide certain advice unless they meet the specific licensing requirements mentioned above. This has further strengthened the quality of advice surrounding the establishment of SMSFs for a large population of advisors.

The Government is also introducing increased education and professional standards for financial advisors which will further educate the SMSF community in this space. Therefore it is our view that the current licensing arrangements and the removal of the accountants exemption surrounding the establishment of SMSFs is sufficient in providing safeguards on who can establish an SMSF.

It is education to specialists and trustees which will improve the documentation for the establishment of SMSFs. The ATO, ASIC and the majority of SMSF advisors all encourage the use of legal professionals in the setup of these documents. Additionally, the SMSFA believes it is always best practice to consult an estate planning specialist when establishing an SMSF but in practice, there is no way to force trustees to consult a lawyer rather than a document supplier, and it is cost which is the major influencing factor. Our proposal in 7.1 (b) regarding the introduction of a regulation which will legislate that SMSF trustees will need to consider estate planning will in no doubt put smart estate planning to the forefront of SMSF trustees and their advisors. The SMSF Association is also supportive of proposals to make succession planning a mandatory unit for CPD points for SMSF Advisors.

The SMSFA would also like to note that it is not just the establishment of SMSFs in which risks may occur but also in ongoing advice. Elderly trustees are at greater risk of being placed under undue influence and for example financial advisors may suggest poor investment choices purely for the purpose of commission. Along with section 961B of the *Corporations Act 2001* which has detailed a best interest duty since 1 July 2013, the law of negligence, equity and contract law are all a variety of streams which regulate the relationship between client and trustee. We believe these protections and the continuing education to advisors will help mitigate the potential for fraud in ongoing SMSF advice.

Proposal 9-2 The witnessing requirements for binding death benefit nominations in the Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 1994 (Cth) should be equivalent to those for wills.

Our concern derives with the fact that many SMSF trustees are not consulting an estate planning specialist when creating these documents. SMSF advisors have death benefit nomination templates which are used with their clients. This is a grey area with both accountants and financial planners providing these documents to clients perhaps inappropriately or without expertise. In this regard there may be merit in placing the emphasis of death benefit nominations as part of an estate planning specialist process, as wills are. Greater awareness and education as to the legal risks around poorly constructed and executed BDBNs may encourage more SMSF trustees and their advisors to seek legal advice on BDBNs (and reversionary pensions).

The SMSFA would be supportive of a proposal that refuses an interested party from witnessing a binding death benefit nomination.

We also note that a review into the BDBN provisions could be conducted separate to the review of elder abuse due to the ambiguities and unintended consequences that can arise in this area. *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121 contains extensive commentary on the BDBN provisions in the SIS Act and SIS Regulations by the South Australian Supreme Court. The court called for reform in this area at [512]:

> *The structure and drafting of sections 58 and 59 of the SIS Act and regulation 6.17A of the SIS Regulations give rise to ambiguities, uncertainties and potentially unintended consequences … It is highly desirable that those provisions be reviewed by the Commonwealth and recast.*

We believe that the ongoing uncertainty around the application of these provisions is an emerging risk for the SMSF and broader superannuation sector as the system matures and Australia's population ages.

Proposal 9-3 The Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 19993 (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 SMSFA believes 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 authorised to do so by the EPOA. We propose the same ruling is applied to reversionary pensions as well.

The renewal of BDBNs should be included in EPOAs by specialist estate planning lawyers to ensure that an estate plan is appropriately maintained beyond any loss of capacity.

These requirements can be potentially be applied through an ATO SMSF Ruling we have described earlier.