Geraldine Lamont
Retail Investors Policy Officer, Financial Advisers
Australian Securities and Investments Commission
Level 5, 100 Market St
Sydney NSW 2000
email: mdareview@asic.gov.au

Dear Ms Lamont,

CP 200 – Managed discretionary accounts: Update to RG 179

The Financial Services Council (**FSC**) welcomes this opportunity to make a supplementary submission in relation to Consultation Paper 200.

The FSC represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees.

Within the corporate trustee and fiduciary sectors of their businesses, licensed trustee company members act as MDA operators and Enduring Attorney for incapacitated clients.

The FSC and its licensed trustee company members are concerned with ASIC's proposals in CP 200, Questions E3Q1 – Q8.

We provide a supplementary submission as attachment 1 to this letter which provides further clarification on the issue of MDA clients who lose capacity.

If you have any questions regarding the FSC's supplementary submission, please do not hesitate to contact Martin Codina, Director of Policy, or myself on (02) 9299 3022.

Yours sincerely

EVE BROWN

Senior Policy Manager - Trustees

Attachment 1

CP 200 Managed Discretionary Accounts - Supplementary Submission

Questions E3Q1 – Q8

No we do not agree. The relief you propose is based on a flawed premise - that once an MDA client loses capacity they continue to be an MDA client. Once an MDA client loses capacity it is legally impossible for them to remain an MDA client as they have no capacity to consent to the continued operation of the MDA.

MDA arrangements involve a donor entering into a **general** power of attorney (POA) for the purpose of authorising the attorney to operate the MDA, at the attorney's discretion, on behalf of the donor. A general POA does not endure the donor's loss of capacity. As such, when a donor of a general POA loses capacity the general POA ceases to have any effect in law, as one party to the arrangement (the donor) no longer has the capacity to participate in the arrangement. The same principle applies to contractual arrangements – once a party to a contract loses capacity the remainder of the contract is voidable. Until such time as another person who is authorised to act on behalf of the donor is found, the MDA operator will hold the MDA account as bare trustee.

Enduring Attorneys and Financial Managers/Administrators

The MDA client may or may not have entered into a completely separate **Enduring** Power of Attorney (EPA) before they lost capacity. If they did, they have made a conscious decision that their attorney will step into their shoes if and when they lose capacity. If they have not entered into an EPA before losing capacity, then the court or the Guardianship Tribunals of the States may appoint an official financial manager/administrator for the person. In law, a person's next of kin is not presumed to be a financial manager/administrator or attorney. The only way that a person or entity may be authorised as a financial manager/administrator or attorney is where the incapable person has appointed them by way of an EPA (before the person lost capacity) **or** by order of the court/tribunal. The court/tribunal will only make orders to appoint a financial manager/administrator in the absence of a properly appointed enduring attorney. As such there can never be both a financial manager/administrator and an enduring attorney – it is either one or the other.

Guardians

A guardian is not the same as a financial manager, administrator or attorney. Guardians are concerned with making personal, medical and lifestyle decisions on behalf of a person who lacks capacity. A guardian may be officially appointed by the courts or by the Guardianship Tribunals of

the States, they may be appointed by a donor before they lose capacity **or**, in some limited circumstances, the next of kin of an incapable person may be presumed in law to be that person's guardian.

Guardians are responsible for personal, medical and lifestyle matters. They are not concerned with financial matters as these fall within the remit of financial managers/administrators and attorneys.

Enduring Attorney is not the trustee company

As stated above, if an MDA client of a trustee company loses capacity (and this fact is proven by way of a medical report), the MDA operator (the trustee company) will hold the MDA account as bare trustee until an enduring attorney or financial manager/administrator is found. If the donor has appointed someone else as their enduring attorney, that person will step into the shoes of the donor and will, in effect, be the new donor for all financial purposes. The original donor's enduring attorney (now, the new donor for the purpose of the MDA) will make all financial decisions for the original donor. If they decide to maintain the MDA on behalf of the original donor, then the MDA will continue on as normal. There is no need to make provision for this situation as the MDA is just a normal arrangement with a capable donor who is legally able to continue with the arrangement. The MDA operator will comply with the law by providing the new donor with all the financial information that is generally required to be provided to a capable donor of an MDA.

Enduring Attorney is the trustee company

The more likely scenario, of which we presume ASIC is seeking to address, is where a donor of an MDA has appointed the MDA operator (trustee company) as their enduring attorney. This often happens because the kind of person who is likely to enter into an MDA arrangement i.e. a financially literate person, is also likely to have put in place other estate planning mechanisms, such as an EPA.

Where the MDA operator (trustee company) is also the donor's enduring attorney, and the donor loses capacity, the trustee company moves immediately from the role of MDA operator to the role of enduring attorney. The latter role encompasses a significantly broader and fully fledged fiduciary duty that is owed by the enduring attorney to the incapable donor. At the same time, the service that is provided and the nature of the client changes entirely. The donor is no longer an MDA client in receipt of financial/product advice services, but rather, is now a fiduciary client in receipt of traditional trustee company services. It is immaterial, that the portfolio of investments and the account number for the client may not change. What is critical is that the legal positions of the donor and the attorney and the type of service provided have changed.

If the enduring attorney is a trustee company, it is likely that the company is licensed to provide traditional trustee company services and will therefore need to comply with the provisions in Chapter 5D of the Corporations Act. However, the ongoing role of an enduring attorney, including every aspect of the administration of that arrangement, is governed by the State Power of Attorney

Acts and the common law in relation to fiduciary duties. The State POA Acts prescribe rules around record keeping and the provision of financial statements.

There is no need for ASIC to make provision for what should happen with respect to an MDA where the donor has lost capacity. This is because at law, when this happen, the MDA effectively ceases to be an MDA.

It is not legally sound and is contradictory to other settled law to require an enduring attorney to provide financial information to the donor's next of kin. The donor's next of kin has no legal right to this information and where an enduring attorney has been appointed, the donor has already made specific arrangements as to what should happen when and if they lose capacity. If the donor had wanted the next of kin to be responsible for their financial affairs in the event of their incapacity they would have appointed that person as their enduring attorney.

In respect to ASIC's concern that proper disclosure continues to occur – this concern is not founded in relation to this situation. An incapacitated donor is no longer a retail client in receipt of financial/product advice. They are now an incapable fiduciary client and the laws around administration of that type of relationship are different.

With all due respect to ASIC, if it proceeds to make these changes to its MDA policy, as it applies to incapacitated clients, then in our view as a matter of law, ASIC would be acting on a false premise and a misunderstanding of the laws applying to persons who are legally incapacitated. ASIC's proposed changes in relation to MDAs where the donor has lost capacity would, as a matter of law, have no effect on a trustee company in these circumstances. This is because a trustee company's activities in this regard are governed by different laws (as set out in our earlier submission on CP 200 and as further explained in this document) which trustee companies will continue to adhere to. We strongly urge ASIC to reconsider its position on this matter.