



A change for the better

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19 August 2009

Submission No. POA/18  
Received 20/08/2009  
Law Reform Committee

Mr Johan Scheffer  
Chair  
Victorian Parliament Law Reform Committee  
Parliament House  
Spring Street  
MELBOURNE VIC 3002

Dear Mr Scheffer

**RE: INQUIRY INTO POWERS OF ATTORNEY**

I refer to your letter of 11 June 2009 inviting submissions to the inquiry into Victorian arrangements for powers of attorney. We have considered the terms of reference and responded to each issue as detailed below:-

- 1. Should the different types of power of attorney documents, and in particular the formality requirements, the terminology and coverage of these documents, be streamlined? If so, how?*

Ideally, Powers of Attorney should be standardised across all states/territories with regards to guidelines and requirements.

Power of Attorney documents with regards to financial matters are either a General Power of Attorney or an Enduring Power of Attorney, the requirements of which are legislated by the laws of the state or territory in which the Power of Attorney document was executed. Both list a Principal/Donor and an Attorney/Donee. As in other states/territories, a General Power of Attorney ceases once the Principal/Donor loses capacity to manage their affairs. An Enduring Power of Attorney continues after the Principal/Donor loses the capacity to manage their affairs.

The layout, terminology and formal requirements of Victorian Powers of Attorney are similar to that of other states/territories with the exception of not registering Powers of Attorney if used to execute a mortgage. Other states/territories require a Power of Attorney to be registered if it is used to effect a mortgage on behalf of the Principal.

Unlike other states/territories, in Victoria both a General Power of Attorney and an Enduring Power of Attorney can be used to effect a mortgage on behalf of the Principal. There are no requirements for the Power of Attorney to be registered to do so.

Unless the Principal specifies the limit of the Attorney's power by crossing out the clause stating 'I authorise my Attorney to do on my behalf anything that I may lawfully authorise an Attorney to do' and adding the specified conditions, an Attorney holding either a General Power of Attorney or an Enduring Power of Attorney can use their power to effect a mortgage or increase/effect a credit limit.

In Victoria, a General Power of Attorney does not require the signing of a Witness Certificate. An Enduring Power of Attorney does require witnessing. An Enduring Power of Attorney has formal requirements for witnesses, as do other states/territories. In Victoria, two witnesses must witness the execution of and sign an Enduring Power of Attorney. An Enduring Power of Attorney is also not valid/effective until the Attorney has accepted their appointment in the form of a Statement of Acceptance/Attorneys Acceptance Certificate.

It may be prudent to enact a system that if an Attorney is to execute a mortgage on behalf of the Principal, the Power of Attorney documents must state the Attorney has the authority to deal with property relating to the Principal, and the Power of Attorney should be registered with the relevant Lands Title Office/Registry.

The above inconsistencies between states increases the complexity of dealing with powers of attorney. Standardisation across states would greatly reduce this.

*2. How should we determine that a donor has capacity to create a legally enforceable document at the time he or she creates a power of attorney?*

CUA infers the responsibility of determining capacity of the Donor upon the Witness.

Responsibility of determining the capacity of the Principal/Donor falls to the Witness. In the case of Victorian Enduring Powers of Attorney, two witnesses (one of the two witnesses must be authorised by law to witness the signing of statutory declarations) are required to witness the execution of an Enduring Power of Attorney. It is the Witnesses responsibility to confirm that the Principal was of sound mind, understood the power given to the Attorney and that the Principal signing the Power of Attorney did so wilfully and not under duress. It should be clearly stated in instructions to witnesses the level of responsibility they hold. It is also the Witnesses responsibility to ensure the Power of Attorney is a complete legal document (ie – all sections completed). When a Power of Attorney is presented to CUA it is assumed the Witness has performed their duty of being a Witness to a Power of Attorney document by ensuring these matters have been checked.

In the case of General Powers of Attorney in Victoria, as they are not required to be witnessed, it can only be assumed the Principal had the capacity at the time the document was executed. If the Principal is not present at the Financial Institution for staff to ascertain capacity, there is no current way of checking the validity of the General Power of Attorney.

It may be a possibility for General Powers of Attorney in Victoria to include a Witness Certificate so it is known the Principal had the capacity to execute a legally enforceable document as this would have been verified by the Witness as part of their duties of witnessing a Power of Attorney document.

3. *How should we determine when a person loses capacity in the context of when an enduring power of attorney is activated?*

CUA requires a letter from the Principal's doctor/medical practitioner stating the Principal is no longer capable of managing their affairs in the event an Attorney's power does not commence until the Principal is 'incapable of managing my affairs'. In the event more than one Attorney is listed and the Attorneys are to act 'successively in the order named' and the first Attorney is no longer capable of managing their affairs, then proof is required that the first Attorney is no longer able to act in the form of a letter from their medical practitioner stating such, before the second Attorney can act.

Again if there were some legislated guidelines around this, it could be easier for all parties to determine activation criteria.

4. *What powers does a donor grant to an attorney when making a power of attorney?*

Powers of Attorney in Victoria can grant a very broad range of powers to the Attorney unless otherwise specified in the Power of Attorney document. Both a General Power of Attorney and an Enduring Power of Attorney give the Attorney the power to do anything that the Principal may lawfully authorise an Attorney to do.

Does this power allow the Attorney to authorise a third party to obtain access to the account? Does this power allow for Attorneys who are to act jointly to use their authority as Attorneys to establish access to the Principal's account to act severally? These are some of the uncertainties currently in existence that if reduced could make the use and application of power of attorney easier.

5. *What safeguards should there be to ensure that power of attorney documents are not abused - both in relation to the execution and the exercise of powers under these documents?*

Identification of the Attorney and the Principal if required is carried out upon transaction/enquiry from the Attorney. Verification as to the Attorneys authorisation is also carried out by obtaining a certified copy of the Power of Attorney document and comparing signatures of the authorised persons.

Often financial institutions rely upon the Attorney acting in good faith as there is no online register to view to see if the Power of Attorney is still current. To avoid this instance, an online register of all Power of Attorney/Enduring Power of Attorney documents could be created which would help to ascertain the authenticity/validity of a Power of Attorney document.

As a financial institution must exercise reasonable care when carrying out business on behalf of the Principal/customer pursuant to a Power of Attorney, staff must be diligent and act on concern of any transactions/behaviour that may raise a 'red flag'.



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Examples of 'red flag' indicators for customer service staff could be large withdrawals being made from the Principal's account, transaction activity that is inconsistent with the Principal's usual patterns and transactions, or activity that appears to be inconsistent with the interests of the Principal. It is difficult to ascertain with certainty the current position of an attorney exercising the powers under a PoA and outcomes that assist to increase this certainty would be well received by the wider group of users.

Thank you for giving CUA an opportunity to provide input. We look forward to your acknowledgement of our submission and outcomes of the inquiry in due course.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Geoff Grant', with a long horizontal flourish extending to the right.

**GEOFF GRANT**  
Company Secretary