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Law Reform Committee

NATIONAL SECRETARIAT

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TCA

Trustee Corporations Association of Australia

20 August 2009

Ms Kerryn Riseley
Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Ms Riseley

Inquiry into Powers of Attorney

The TCA appreciates the invitation to make a submission to the Committee's Inquiry into Powers of Attorney.

Background

The core business of our members involves the provision of 'traditional' wealth protection and transfer services, encompassing:

- estate planning and preparing wills.
- acting as executor of deceased estates.
- acting as trustee of personal trusts, including testamentary trusts.
- administering client assets under powers of attorney.

Some further information on the industry is attached.

As a general proposition, we fully support initiatives aimed at promoting uniformity across all jurisdictions and maximum operational efficiency in the provision of these services.

As regards powers of attorney, in 2006 we provided comments to the Law Institute of Victoria to assist with its submission to Attorney General Hulls on possible improvements to enduring powers of attorney (also attached).

The comments in that letter are applicable to your inquiry.

Some further comments are set out below.

Terms of reference

We note that the terms of reference require the Committee to consider ways of streamlining and simplifying power of attorney documents to enable more Victorians to plan for their "financial, lifestyle and healthcare needs."

Accordingly, we are surprised that "enduring powers of attorney (medical treatment)" under the *Medical Treatment Act 1986* are excluded from the review, given that those instruments also involve assigning certain responsibilities, in relation to a person who becomes incompetent, to another person called an "agent".

We also note that the Victorian Law Reform Commission has been asked to review and report on the desirability of changes to the *Guardianship and Administration Act 1986*, having regard to various matters, including "the alignment of guardianship and administration law with other relevant statutory regimes", which would encompass the *Instruments Act 1958* and the *Mental Health Act 1986*.

The Commission has also been asked to take into account the results of any other relevant, contemporaneous reviews or policies in these fields, which would clearly include the Parliamentary Committee's current inquiry.

Streamlining documents

We agree that the Committee should examine the scope for streamlining the various forms of power of attorney.

The forms should be sufficiently flexible to allow:

- a donor to appoint the same person(s) as attorney(s) for financial matters and / or for personal/health matters under an enduring power.
- a donor to appoint different attorneys for financial matters versus personal/health matters and, if confidentiality is desired, not involve each attorney, when accepting their respective appointments, seeing the details of the other attorneys.

Witness requirements

Witness requirements should be same across all powers of attorney.

At present, a financial enduring power requires an authorised witness.

We believe that all types of attorney should require an appropriate witness (such as eligible prescribed witnesses for enduring powers in NSW, ie: a solicitor, a local court registrar or a licensed conveyancer / employee of a trustee corporation who has completed an appropriate course of study).

While this might represent an inconvenience to the donor, it would lead to a higher standard of authenticity of documentation.

Attorneys

All attorneys should be required to sign and date a statement of acceptance of a power of attorney.

This ensures that attorneys are aware of their appointment, and provides a record of their signature.

While many donors appoint a family member as attorney, there is a good case, given the importance of these documents, for donors to be encouraged to consider appointing a professional entity such as a trustee corporation or a solicitor. This can be more critical when large sums of money are involved and / or there are 'dysfunctional' family issues.

If a 'layperson' is to take on the responsibilities of attorney, they should be encouraged to seek the services of a qualified financial planner.

Terminology

Consideration should be given to adopting standard terminology in relation to powers of attorney and guardianships, for example:

- general power of attorney (financial)
- enduring power of attorney (financial)
- enduring power of attorney (medical treatment)
- guardian
- enduring guardian

Attorney powers

The wording of a power of attorney should ensure that a donor is able to clearly express when the power is to commence and how an attorney is to carry out their specified responsibilities.

Attorney rights

We believe that financial attorneys should have the same rights as administrators appointed by VCAT in terms of access to a client's will.

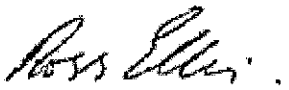
When an administrator or attorney is doing investment reviews for these clients, it is important to know if there are any specific bequests or devises of any assets which prevent those assets from being sold.

Also, an attorney should be entitled to act as a trustee.

Reciprocity

If powers of attorney are to remain State / Territory based, rather than move under Commonwealth law, efforts to facilitate maximum reciprocity across jurisdictions should continue.

Yours sincerely



Ross Ellis

Executive Director

TRUSTEE CORPORATIONS ASSOCIATION OF AUSTRALIA

The Trustee Corporations Association (TCA), formed in 1947, is the peak representative body for the trustee corporations industry in Australia.

Its main objectives are to:

- represent and advance the interests of member statutory trustee corporations with government, regulators and the wider public,
- serve as a forum for discussion on matters of mutual interest to members,
- ensure that an adequate training program in the Personal Trust field is available to members, and
- provide centralised services for members, including maintenance of industry data.

The Association represents 17 organisations, comprising all 8 Public Trust Offices and the great majority of the 10 private statutory trustee corporations.

The Association operates out of premises in Sydney. It is controlled by a National Council, which comprises the Chief Executive Officer of each member institution, and an Executive Committee, made up of a small group of those persons.

Member products and services

In the 1870s, Governments first enacted legislation to extend the role of executor or administrator of a deceased estate, traditionally taken on by a natural person, to licensed trustee corporations.

This was to benefit the public by providing greater expertise and resources than are available from an individual, together with perpetual succession to a client establishing a long-term trust.

Within the next decade, most of the trustee corporations that are currently authorised under relevant State and Territory law were established.

Today, trustee corporations provide a wide range of wealth management products and services to individual, family and corporate clients, including:

- **Traditional personal wealth management**

  Wealth protection and transfer

  - estate planning and writing wills
  - acting as executor of deceased estates
  - establishing, and acting as trustee of, personal trusts, including testamentary trusts
  - administering client assets under Powers of Attorney

Protecting vulnerable members of the community

- acting as financial manager or guardian, usually under a Court or Tribunal order, for persons unable to look after their own affairs, including minors and the intellectually-disabled

Administering charitable trusts and foundations

- including for medical research, galleries, museums, and education scholarships

- **Other personal business**
  - trustee or administrator for small superannuation funds
  - providing tax advice and preparing tax returns
  - financial planning
- **Funds management**
  - offering most types of unit trusts and common funds
- **Corporate activities**
  - registry and custodial operations
  - trustee for debenture and convertible note issues
  - securitisation facilities
  - compliance monitoring
  - trustee or administrator for retail superannuation funds

Industry statistics

In aggregate, trustee corporations have about $500 billion of assets under administration or management, and capital resources of about $1 billion.

TCA members manage about 2,000 charitable trusts and foundations with assets of about $3.5 billion; in 2007/08 they distributed about $300 million to worthy causes as grants from those trusts and foundations or directly as part of deceased estate administrations.

They employ over 3,800 staff in almost 90 offices located in all States and Territories of Australia.

Almost 2 million Australians have their wills recorded with trustee corporations. Each year trustee corporations:

- write about 65,000 wills and powers of attorney
- administer about 10,000 deceased estates
- administer assets under agency arrangements or Court / Tribunal orders for about 43,000 people
- prepare over 40,000 tax returns

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Trustee Corporations Association of Australia

13 January 2006

Ms Nadia Venier
Solicitor
Secretary - Property & Environmental Law Section
Law Institute of Victoria
470 Bourke Street
MELBOURNE VIC 3000

Dear Ms Venier

Review of Enduring Powers of Attorney

Thank you for inviting the TCA to comment on the operation of the EPA provisions of the *Instruments Act 1958* in Victoria.

Our members have raised a number of issues which they feel warrant attention, including amendments to the legislation in some instances.

1. Record keeping

Members suggest that there is often uncertainty on the part of non-professional attorneys as regards the nature of the records they are required to keep. Members are asked:

- is a computer package needed?
- can a ledger book / exercise book be used?
- must all receipts be kept?
- are any 'sample accounts' available?

Members generally advise those people to look at the format of the accounts prescribed by the Victorian Civil and Administrative Tribunal for administrators.

Those accounts are very detailed, requiring extensive information on the represented person's various assets and liabilities, as well as considerable details as to that person's income and expenditure over the year.

Also, numerous statements, receipts and contract notes must be attached, and the accounts are subject to review by VCAT.

We do not see the need to prescribe a particular form of accounts to be maintained by all attorneys.

TCA members have been acting in this role for many years and such a step would probably require significant systems modifications to their internal systems, for no benefit in terms of the quality of the service they provide to thousands of clients or the level of their accountability.

However, consideration perhaps could be given to prescribing a form of accounts for non-professional attorneys (eg an abridged version of the VCAT form), with the possibility of VCAT (or VCAT-appointed examiners) auditing those accounts on an 'as-needs' basis.

2. Witness questions

Our members have also noted that there is uncertainty on the part of witnesses regarding the nature of the questions they should ask in order to determine that the donor appears to have the capacity to make an EPA.

Prospective witnesses often ask:

- are there any 'sample questions'?
- do we need to keep records of our conversation with the donor?
- if so, in what format?

We note that the directions supplied by the Department of Justice are quite detailed and members have said that, whilst they provide copies to witnesses, many people indicate that they have no intention of reading them.

Similarly, the checklist devised by the Legal Practitioner's Liability Committee, which we understand is only available to legal practitioners, involves what we believe is an unnecessarily complex process, including the witnesses transcribing what the donor actually has to say.

In situations where our members are preparing an EPA and/or taking on the attorney role, we believe that they are well placed to provide witnesses with appropriate guidance as regards determining donor capacity.

If a checklist for witnesses is needed, we suggest that a simple guide along the lines of the Attachment should be considered.

3. "Good faith" defence

We believe that the legislation should provide a "good faith" defence for witnesses (to help overcome witness reluctance), and for doctors giving medical certificates regarding donor capacity.

4. Donor capacity in s118

Some members believe that s118(2)(a) [understanding of ability to insert conditions, limitations and instructions] and (d) [the ability to revoke whilst capable] should be removed from the test of capacity to make an EPA, as these matters go beyond the common law requirements of understanding the nature and effect of the document.

Others members feel they should remain as they clarify the nature and effect of the document.

5. Instructions

We believe that clarification is needed as to the nature of "instructions" in s118(2)(a), ie whilst they may be overridden by a donor with capacity, it is unclear whether they bind the attorney after the donor's loss of capacity (compared with "conditions" and "limitations").

This uncertainty is compounded by the fact that "limitations" and "restrictions", but not "conditions", are used in s118(2)(c).

6. Alternative attorney

We feel that clarification is needed as to the mechanisms available to the alternative attorney (eg access to VCAT?) where the primary attorney refuses to act, a situation apparently not contemplated under the new legislation.

Further, are EPAs made before 1/4/04, which permit an alternative attorney to act where the primary attorney refuses to act, negated by the saving provision in s125ZN?

Also, if a donor appoints only one attorney, it appears that only one alternative attorney can be appointed – not one or more jointly or jointly and severally.

The Act refers to "alternative attorney" but, if taken purely as singular, this would prohibit a donor from appointing in the first instance their spouse, and as alternative attorneys two or more of their children, either jointly or jointly and severally.

7. Legal incapacity in s115(2)

This is an incredibly complex area, but exactly when an EPA should be enforced due to lack of capacity could be re-examined.

To assist in eliciting medical evidence of loss of capacity, the meaning of "legal incapacity" in s.115(2), in particular whether a person can be legally incapable in respect of some aspects of their affairs and not others (eg in line with the Queensland legislation), should be clarified.

Also, what is considered proof of loss of capacity? Can an attorney rely on a GP's certificate or is an expert's report required?

8. Register of EPAs

Members have also raised the issue of whether there should be some form of register that notifies people (notably VCAT) that an EPA is in existence. There have been situations where a donor has lost capacity and an administrator has been appointed, even though a member trustee corporation was already the attorney under an EPA.

We recognise that this is a complex matter that warrants careful deliberation.

A non-compulsory register might be of limited value. However, whilst requiring registration of all EPAs would seem to offer potential benefits in terms of enhanced accountability for attorneys and easier monitoring of dealings under EPAs by the authorities, such a system would potentially be very costly.

Compulsory registration also raises serious privacy concerns. It is possible that many elderly people would elect to forego an EPA, rather than have their privacy compromised by registration. If this were the case, a registration requirement might prove counterproductive.

Further, if compulsory registration were to be adopted, it probably would need to be done on a national basis. If EPAs were registered in some jurisdictions only, concerns would arise with regard to cross-recognition and jurisdiction-hopping.

9. Oral revocation

S125H(1)(a) appears to allow for oral revocation of an EPA, which would be an anomaly given the strict process that needs to be adhered to for a written revocation.

10. Remuneration

Given that the role of attorney under an EPA is to properly look after the financial affairs of the donor, consideration might be given to the attorney possessing certain minimum professional qualifications required to give financial advice if the attorney is to be remunerated.

We note that this might be restrictive where a donor wished to appoint a family member or friend who may not possess professional qualifications but who may at some stage seek remuneration for fulfilling the role of attorney.

11. Validity of EPAs

Many banks and other institutions have 'over-the-top' and / or inconsistent processes before accepting the validity of an EPA. A clear process for being recognised as the attorney would be a useful practical step.

However, we appreciate that financial institutions are regulated by many state and commonwealth Acts and have a number of compliance obligations, eg 100 point check for persons operating accounts. So, whilst the financial institutions would no doubt welcome legislative protection, we are not certain that it can realistically be achieved by an amendment to the *Instruments Act 1958*.

12. Prudent person principle

Whilst attorneys, administrators and trustees all act in a fiduciary capacity, only administrators and trustees are required to invest in accordance with the prudent person principle, as codified in the *Trustee Act* 1958. Perhaps attorneys should also be required to invest a donor's funds in accordance with that principle.

Such a requirement, which might entail obtaining professional financial advice, may be preferred to the proposal put forward in point 10 above.

13. Ademption

Under s53 of Victoria's *Guardianship and Administration Act 1986*, the sale or other disposition of property by an administrator during the testator's lifetime does not alter a represented person's interest in that property.

However, the Victorian legislation has no equivalent to s22 of NSW's *Powers of Attorney Act 2003*, which provides protection against the ademption of testamentary gifts where such gifts are disposed of by an attorney during the lifetime of the testator. It is our view that a section preserving such gifts should be included in the *Instruments Act 1958*.

14. Title of EPA document

We note that the Act refers only to an "enduring power of attorney" whereas the prescribed Form uses the term "Enduring Power of Attorney (Financial)".

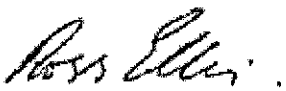
We suggest that a consistent legal term should be used to reduce confusion, preferably one that provides a clear distinction from an "Enduring Power of Attorney (Medical Treatment)" and an "Enduring Power of Guardianship".

"Enduring Power of Attorney (Financial)" would seem the most obvious candidate, especially as it had already developed a degree of popular industry currency even before the 2004 changes.

.....

We would, of course, be happy to discuss these issues with you.

Yours sincerely



Ross Ellis

Executive Director

Attachment

CHECKLIST TO ASSIST WITNESSES TO AN ENDURING POWER OF ATTORNEY

	YES or NO
Donor confirmed to be over 18 years of age. Current medical certificate has been produced (if applicable).	....
Donor stated to us that they were signing the enduring power of attorney freely and voluntarily. If interpreter used, certificate signed by interpreter has been obtained.	....
We explained to the donor that an enduring power of attorney allows the attorney to make financial and legal decisions for them subject to any limitations, conditions or instructions included in the power. We also discussed any limitations, conditions or instructions included in the subject enduring power of attorney. Based on the answers to our questions, we believe that the donor understood our explanation.	....
We noted that the donor can specify a time or event when the power starts to operate and/or ends. We discussed when the subject enduring power of attorney will start and end. Based on the answers to our questions, we believe that the donor understood our explanation.	....
We explained that the donor may revoke or cancel the power as long as they had the legal capacity to do so. We explained that if the donor lost legal capacity they could not revoke the power or appoint a new attorney. Based on the answers to our questions, we believe that the donor understood our explanation.	....
We explained to the donor that once the enduring power of attorney commences the attorney can stand in the donor's place and do most things the donor could do (eg. withdraw money from the donor's bank account, mortgage the donor's property, sell the donor's property), subject to any limitations in the power. Based on the answers to our questions, we believe that the donor understood our explanation.	....
We explained that an attorney can continue to deal with the donor's affairs and act in their name after the donor has lost legal capacity. Based on the answers to our questions, we believe that the donor understood our explanation.	....
Any other comments on capacity:	