

24 November 2009

Ms Kerryn Riseley  
Executive Officer  
Victorian Parliament Law Reform Committee

By email: [vplic@parliament.vic.gov.au](mailto:vplic@parliament.vic.gov.au)

### **Operation of Penalty Provisions in the *Powers of Attorney Act 1998* (Qld)**

Dear Ms Riseley,

1. This submission supplements the original submission of Seniors Rights Victoria (**SRV**), submitted to the Parliament of Victoria Law Reform Committee on 21 August 2009, and oral evidence given at the public hearing on 22 October 2009.
2. As requested by the committee SRV has inquired into the operation of the penalty provisions in the Queensland *Powers of Attorney Act 1998* (**POA Act**), in particular the number of prosecutions and successful prosecutions brought under this Act.

#### **Penalty Provisions**

3. Six sections of the POA Act contain penalty provisions. Each of these sections creates an offence of engaging in behaviour contrary to the interests of the donee, the maximum penalty for which is 200 penalty units. The relevant sections of the POA Act are as follows:
  - S 26 – Offence to dishonestly induce the making or revocation of power of attorney
  - S 61 – Offence to dishonestly induce the making or revocation of an enduring document
  - S 66 – Act honestly and with reasonable diligence
  - S 71 – Not exercise revoked power
  - S 74A – Prohibited use of confidential information
  - S 86 – Keep property separate (maximum penalty of 300 penalty units)
4. We contacted the following three organisations to ascertain the operation of the POA Act penalty provisions in practice:
  - the Guardianship and Administration Tribunal;
  - the Public Trustee of Queensland; and

- the Adult Guardian.

4.1 These three organisations were identified as being the most likely to have information regarding the operation of the penalty provisions in practice based on their roles and responsibilities in relation to the POA Act. The information provided by each is outlined below along with a brief summary of their role in respect of the POA Act.

#### **Guardianship and Administration Tribunal**

5. Pursuant to section 109A POA Act, the Guardianship and Administration Tribunal (**GAAT**) has the same powers and jurisdiction as the Supreme Court (Queensland) in relation to enduring documents. That is, the GAAT may make a determination that an attorney is in breach of any of the above provisions and seek payment of a penalty.<sup>1</sup>
6. Through correspondence SRV established that the GAAT has never prosecuted an attorney under the POA Act and as such has no statistics on the operation of the relevant sections. The GAAT informed SRV that the majority of litigation in this particular area is usually carried out by individuals or trustee companies. The Public Trustee of Queensland (**PTQ**) may also bring an action in this area where they have been appointed administrators after removal of an attorney by the GAAT.

#### **Public Trustee of Queensland**

7. The PTQ may be directly appointed as an attorney under the POA Act. Further, as mentioned above (paragraph 6), where the PTQ is appointed as administrator by the GAAT, it may bring an action against a prior attorney for breach of one of the penalty provisions.
8. Preliminary discussions with the PTQ revealed that the penalty provisions are not an area that the organisation has experience with directly as investigations as to whether breaches have occurred are undertaken by the GAAT or Adult Guardian (**AG**). The PTQ may intervene once appointed as administrator. However, based on anecdotal information this has not occurred to date.

#### **Adult Guardian**

9. Section 180 *Guardianship and Administration Act 2000* (Qld) (**GA Act**) affords the AG investigative powers in the following terms:

The adult guardian may investigate any complaint or allegation that an adult with impaired capacity for a matter—

- (a) is being or has been neglected, exploited or abused; or
- (b) has inappropriate or inadequate decision-making arrangements.

10. Accordingly the AG may investigate the actions of an attorney under the POA Act. If a determination is made that the attorney lacks competence, the AG may use section 195 GA Act to suspend the attorney's powers for a period of no longer than three months. A determination as to attorney competence includes a contravention of the POA Act.<sup>2</sup>

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<sup>1</sup> One of the more commonly used powers by the GAAT is section 116 POA Act – Order removing attorney or changing or revoking document

<sup>2</sup> Section 195(2)(c) *Guardianship and Administration Act 2000* (Qld)

11. Preliminary correspondence with AG revealed section 66 POA Act as an often utilised provision in investigations where there have been suspected conflict transactions (under section 73 POA Act) or where attorneys have acted contrary to the general principles for adults with impaired capacity (under section 76 POA Act). However, it appears from the case law discussed below that whilst a breach of the penalty provisions may be relied upon by the GAAT to remove a donee, penalties against the donee are rarely if ever applied.

### **Case law**

12. GAAT decisions cite two of the penalty provisions under the POA Act, sections 66 and 86. However, in those cases where there was a finding of a breach of the penalty provisions, the substituted decision maker was removed but the orders did not include a penalty against the donee.<sup>3</sup>
13. Five Supreme Court judgments considered section 66 of the POA Act.<sup>4</sup> Of these five cases, in three there was no finding of dishonesty,<sup>5</sup> in one the applicant could not succeed under the section<sup>6</sup> and in the fifth Atkinson J found that '[o]nly a trial can determine whether the allegations of failure to comply with section 66 of the Powers of Attorney Act are correct or not'.<sup>7</sup>

### **Conclusion**

14. Based on the limited publicly available information it would appear that the penalty provisions of the POA Act are rarely utilised, and where they are considered, no breach has been found or if a breach has been found, that breach has been relied upon as a basis to remove the donee and/or order compensation rather than to apply a penalty.
15. It could arguably be inferred from these findings that the penalty provisions have served their purpose in that the increase in awareness of the obligations on donees and penalties for breach of those obligations under the POA Act has resulted in very few findings of misuse and abuse of powers under the Act.

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<sup>3</sup> Many findings of penalty provision breaches by GAAT were brought after investigation and determination by the AG. The following cases are an example of the approximately 40 cases heard by the GAAT since 1998 which included decisions regarding breaches of penalty provisions: KAA, Re [2008] QGAAT 7 (21 January 2008); BAI, Re [2007] QGAAT 81 (11 December 2007); RRI, Re [2006] QGAAT 40 (23 June 2006); WCD, Re [2006] QGAAT 27 (17 July 2006); ELF, Re [2004] QGAAT 54 (11 October 2004); MCB, Re [2004] QGAAT 59 (8 September 2004)

<sup>4</sup> A search of this section was chosen as based on information from the Adult Guardian that it is the most commonly utilised of the penalty provisions. A brief search of decisions including consideration of other penalty provisions bore no fruit.

<sup>5</sup> *Greenland & Anor v Intellectually Disabled Citizens Council of Queensland & Anor* [2000] QSC 084; *Ede v Ede* [2006] QSC 378; *AAGT Private Loans Pty Ltd v Ferguson* [2009] QSC 113

<sup>6</sup> *Smith v Glegg* [2004] QSC 443

<sup>7</sup> *Bidner v Cahill* [2006] QSC 406 [18]