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Law Reform Committee

FPA

Financial Planning Association
of Australia Limited
ABN 62 054 174 453

Level 4, 75 Castlereagh Street
Sydney NSW 2000

GPO Box 4285
Sydney NSW 2001

Tel: 02 9220 4500
Fax: 02 9220 4580

Member Freecall: 1800 337 301
Consumer Freecall: 1800 626 393
Fax: 03 9627 5280

fpa@fpa.asn.au
www.fpa.asn.au

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The Honourable Johan Scheffer, MLC
Chair, Law Reform Committee
Parliament of Victoria
Spring Street
East Melbourne, VIC 3002

Dear Chairman Scheffer

Thank you for inviting the FPA to enter a submission to the Committee's inquiry into Powers of Attorney. Powers of attorney are of particular interest to our membership, given their role not only in the estate planning sphere, but also in routine performance of investment functions undertaken on clients' behalf.

Given the nature of our membership, our response focuses on issues specific to financial powers of attorney. As a general matter, the legal regime in which powers of attorney exist would benefit from considerable simplification. Within our responses to the terms of reference, we outline a new approach to powers of attorney that would result in greater efficiencies and clearer legalities, ultimately to the benefit of donors.

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?

Power of attorney documents should be streamlined and simplified. In the broader sense, a federal legal regime should be established for powers of attorney, so that one uniform regime would apply across Australia. However, whether reform is undertaken at the federal or state level, beneficial changes can be made to achieve desirable simplification.

First, the statute should provide a statutory form, the use of which is optional, but which, in most cases, donors would choose to use. The form should operate with the simplicity offered by a fill-in-the-blank approach, and should use plain English. In addition, the form should contain a standard list of powers that are routinely granted, and provide for the donor to choose from the list, or designate that all the powers in the list should be granted. There should also be a list of additional powers which, to be given, must be explicitly granted. This is covered in greater detail below. It is important that the standard form contain an appropriate information section relevant to both donor and attorney, explaining duties and liabilities.

Second, the law should offer extensive gap-filling provisions to address the cases of power-of-attorney documents that lack certain terms. This would allow for donors to make very brief and simple power of attorney documents, that are still valid and effective, by simply writing essential terms and relying on statute to fill in whatever else is needed.

Additionally, the law should provide for a presumption of durability. The reason for this is to avoid situations where a non-durable power of attorney would cease to have effect due to donor incapacity. This would thus allow the avoidance of costly court procedures to establish guardianship. However, the option should still be maintained for donors to negate the presumption of durability by including express verbiage to that effect.

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?

The standard for powers of attorney should be the same as that applicable to routine contracts. In any case, we should start from the point of presumption that a donor has the capacity to create a legally enforceable document. The person attacking the validity should bear the burden of proving the lack of capacity at the time the document was perfected. Such proof should include strong medical testimony. This approach would balance donors' need for protection with their freedom to contract.

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

The legal regime should encourage the avoidance of arrangements involving activation of powers of attorney by determinations of incapacity. To lay the foundation for this, the law should contain a provision to the effect that, unless otherwise stated, the power of attorney is effective immediately. Using this provision, a donor need not be concerned with the details of how incapacity will be determined, because determination of incapacity would be irrelevant to the activation of the power of attorney. Though the attorney would immediately be empowered to manage the donor's property, if the donor fears that an attorney will act improperly now, the donor should anticipate that the attorney will act improperly later and select a more trustworthy agent.

However, in order to preserve flexibility, donors should be able to negate the presumption of immediate effect by including express language to that effect. So, in situations where activation of a power of attorney hinges on incapacity, the incapacity should be determined in accordance with the terms of the power of attorney. In this regard, the law should give effect to a donor's designation of an individual or a series of individuals to make a determination of incapacity. In the absence of specific terms to this effect, the law should step in with gap-filling provisions to stipulate that the loss of capacity should be determined by a court of law, based on testimony from a physician or licensed psychologist, depending on the nature of the incapacity.

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

As mentioned above, there should be a standard set of powers that are granted when making a power of attorney, and a further set that can only be granted individually and specifically. The standard set should include appropriate, far-reaching powers, as would be granted by most donors, with reference to the following areas:

- Real Property
- Tangible Personal Property
- Stocks and Bonds
- Commodities and Options
- Banks and Other Financial Institutions
- Operation of an Entity or Business
- Insurance and Annuities
- Estates, Trusts, and Other Beneficial Interests
- Claims and Litigation
- Personal and Family Maintenance
- Benefits from Governmental Programs and Civil/Military Service
- Retirement Plans
- Taxes
- Gifts within certain limits established in statute

The statute should expressly and thoroughly describe powers related to each of these areas, so that donors thoroughly understand the powers they are granting and so that attorneys are not left unable to complete necessary tasks on behalf of their respective donors. Such an approach would provide legal certainty for both parties, ultimately to the benefit of donors.

Also as mentioned above, there should be a separate list of powers that are only granted individually and explicitly. These should include the authority to:

- create, amend, revoke, or terminate an inter vivos trust
- make gifts outside applicable statutory limits
- create or change rights of survivorship
- create or change a beneficiary designation
- delegate authority granted under the power of attorney
- waive the donor's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- exercise fiduciary powers that the donor has authority to delegate
- disclaim property, including a power of appointment

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?

To protect donors, while also allowing them flexibility, statute should establish a high standard of conduct based on certain duties, some of which are non-waivable, and some of which are waivable. All attorneys should have certain non-waivable duties, including:

- acting in accordance with the donor's reasonable expectations to the extent they are actually known to the attorney and, if not, in accordance with the donor's interest first
- acting in good faith
- acting within the scope of authority granted in the power of attorney

However, recognising that donors may wish to appoint trusted family members or friends who may lack the skills of a professional property manager, donors may wish to apply a lower standard to such family members/friends, and a higher standard to professionals. The higher standard should include:

- acting loyally for the donor's benefit
- avoiding conflicts of interest
- acting with ordinary care, competence and diligence
- keeping records and receipts
- cooperating with the donor's health care attorney
- preserving the donor's estate plan if doing so is in the donor's best interest

The higher standard should apply to all attorneys, by default. In situations in which donors may wish to waive certain duties, such should only be achievable by explicit terms to that effect. Such an approach would allow donors to benefit from the protection of a high standard of conduct when dealing with professionals or un-trusted family members or friends, but would give them the flexibility to appoint a trusted family member or friend, on whom they may not wish to impose onerous legal obligations. However, the law should not allow the standard to be lowered too far that a dangerous situation would be created. To this end, the non-waivable duties would always apply.

Additionally, there should be limits on the extent to which donors may exonerate their attorneys. One can imagine several circumstances in which a donor may wish to exonerate an attorney for breaches of duties, such as repeated attacks on the attorney by contentious family members. However, donors should not be able to relieve attorneys of liability for breaches committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the donor's best interest.

Statute should also describe a list of individuals who have standing to petition the court to construe a power of attorney and to review the attorney's conduct. Such people should include:

- the donor
- the attorney
- the donor's guardian or conservator

- the donor's attorney under a medical power of attorney or advance directive
- the donor's close relatives, including spouse, parent, descendant, and presumptive heirs
- a person named as an at-death beneficiary in a contract, trust, or similar non-probate asset
- a governmental agency with authority to protect the donor's welfare
- the donor's caregiver
- a person asked to accept the power of attorney
- anyone who can demonstrate sufficient interest in the donor's welfare

In this way, donors would be provided with a flexible regulatory regime that empowers them to appoint their choice of attorney, subject to their choice of the level of protection.

Dishonor

The largest issue, dishonor, relates to all of the terms of reference. All too often, attorneys are met with dishonor when presenting perfectly valid powers of attorney in order to conduct legitimate business on behalf of their donors. The legal regime should contain several measures to address this problem.

First, the law should grant protection to people who rely in good faith on an acknowledged powers of attorney as long as they are without knowledge that the power has been revoked, has been terminated, is invalid, or that the attorney is exceeding the authority, or exercising it improperly.

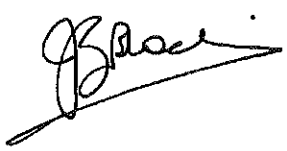
Second, the law should impose liability on those who refused to accept a valid power of attorney. To effect this, it is important to give people time to consider whether the power of attorney is valid. For this reason, we suggest that people have five business days to decide whether to accept a presented power of attorney. This would allow them to check with legal counsel and make necessary verifications, while reducing the likelihood of harm to the donor due to delays imposed on the attorney's conduct of the donor's business. Those who continue to refuse to accept a valid power of attorney after the deadline would be subject to an order by a court to accept the attorney's authority, and would be held liable for attorney's fees and costs.

Improving Accessibility

Recognising the importance to donors of having power of attorney documents, it is important to maximise access to the quality execution of these instruments. To this end, the law should be amended such that statutory declarations, including powers of attorney, can be witnessed by financial planners who are properly accredited. Ideally, this would take place at the federal level, but the same benefits could accrue from amendment to relevant statute at the state level.

These recommendations would serve to create a legal environment for powers of attorney in which donors have appropriate protection and appropriate flexibility.

Yours sincerely



Jo-Anne Bloch
Chief Executive Officer