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Law Reform Committee

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Mr Johan Scheffer MLC
Chair, Law Reform Committee
Parliament House, Spring Street
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Dear Mr Scheffer,

## Inquiry into Powers of Attorney

The Australian Bankers' Association (ABA) welcomes the opportunity to provide comments to the Law Reform Committee's inquiry into powers of attorney.

## 1. Introductory remarks

The ABA's Code of Banking Practice states that banks will take reasonable measures to enhance their access to transaction services for older customers and customers with a disability[1]. The ABA and our member banks watch over the needs of banking customers, including older people and people with a disability. While banks have a number of procedures for dealing with, and products and services available for, their older customers and customers with a disability, substitute decision making means that bank customers may have a third party (formally or informally) transacting on their behalf.

### 1.1 The role of substitute decision making

Bank customers who have in place formal arrangements for a third party to act on their behalf, such as an enduring power of attorney, enable an agent to conduct their banking business or specific banking and financial transactions (where the power or order is limited). While banks take great efforts to ensure that their customers can conduct their transactions in a timely and efficient manner and that the person acting as agent is genuine and the instrument or authority they present is authentic, there are some practical impediments. With this in mind, we believe that governments should undertake initiatives aimed at improving the use of powers of attorney by Australians, and across Australia.

Firstly, apart from registration of powers with the Land Titles Office/Department of Lands (as required), currently there is no mandatory registration of powers of attorney to verify the holder of the current instrument or authority. Even though there are similarities across states and territories, there are different legislative schemes and an absence of standardisation of laws.

[1] Clause 6 of the Code of Banking Practice.
http://www.bankers.asn.au/ArticleDocuments/20040603_FINAL_CODE_MODIFIED_PDF.pdf

The ABA believes that it is important for governments to address operational problems with powers of attorney, including establishment of a central registry, harmonisation of forms and implementation of inter-jurisdictional recognition of instruments. Some states have in place processes for 'mutual recognition' of enduring powers of attorney established in other states in their Powers of Attorney Acts. We understand that the Standing Committee of Attorneys-General have mutual recognition on its agenda.

Secondly, currently there is limited collaboration between relevant authorities to promote consistent protocols for managing substitute decision making processes by banks and other businesses and service providers. It is important that governments work together to improve continuity of processes across jurisdictions and assist older people and people with a disability to transact business and financial activities by providing the necessary mechanisms and guidance to businesses to help their customers.

Thirdly, currently there is limited community awareness about formal third party arrangements and substitute decision making. It is important for the Federal Government, in collaboration with state and territory governments, to develop a national community awareness raising campaign and consumer education campaign to facilitate greater use of powers of attorney.

Bank customers may also put in place informal arrangements with a third party, such as a member of their support network, to assist them with their banking business and financial transactions. While informal arrangements may be preferred by some people, in particular older people that may feel less familiar with using emerging technologies, such arrangements may leave them more vulnerable to exploitation and financial abuse, even by their trusted family member, friend, social worker or other third party. For example, if a customer gives their PIN or other access code to another person and there are unauthorised transactions, the customer would be liable for those transactions[2].

Banks are concerned about customers entering informal arrangements, especially where customers knowingly or unknowingly breach their contract with the bank and/or give up their consumer protections. With this in mind, we believe that governments should take greater efforts to promote the use of legitimate processes for substitute decision making by removing impediments to the use of powers of attorney and promoting the use of powers of attorney by Australians, and across Australia.

## 2. Specific comments

*Should the different types of powers of attorney documents, and in particularly the formality requirements, the terminology and coverage of these documents, be streamlined? If so, how?*

The ABA believes that the different types of powers of attorney exist to fulfil different substitute decision making requirements. For example, a power of attorney can be enduring or general, and can be limited and relate to certain decisions, such as medical and health, legal and financial, or lifestyle, or in place for a specified period of time. Powers of attorney involve a formal agreement giving a third party (an attorney) the power to make decisions on an individual's behalf (the donor). The decisions that the attorney makes have the same legal force as if the person had made the decisions for themself.

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[2] Section 5 of the Electronic Funds Transfer (EFT) Code.
http://www.fido.asic.gov.au/asic/pdflib.nsf/LookupByFileName/eft-code-nov2008.pdf/$file/eft-code-nov2008.pdf

The ABA notes that in Victoria there are four different types of powers of attorney[3]:

- *General Power of Attorney*: An individual can appoint a third party, usually for a specified period of time, to make legal of financial decisions on their behalf when they are absent (e.g. the person is overseas and needs someone to sell their house or pay their bills). In some circumstances, limitations can be placed on the power of attorney so that the agent is only authorised to act on behalf of a donor in specific situations.
- *Enduring Power of Attorney (Financial)*: An individual can appoint a third party to make legal or financial decisions on their behalf, in the event that the individual is unable (i.e. loses the capacity) to make those decisions at some point in the future due to illness, injury or accident.
- *Enduring Power of Attorney (Medical Treatment)*: An individual can appoint a third party to make medical treatment decisions on their behalf, in the event that the individual is unable (i.e. loses the capacity) to make those decisions at some point in the future due to illness, injury or accident.
- *Enduring Power of Guardianship*: An individual can appoint a third party to make lifestyle decisions on their behalf, in the event that the individual is unable (i.e. loses the capacity) to make those decisions at some point in the future due to illness, injury or accident.

The ABA is aware of a number of operational problems with the use of powers of attorney, including:

- *Differences in instruments:* Different instruments and orders across jurisdictions confer different decision making powers, employ different processes and use different terminology. These different requirements often mean that such arrangements cannot be used outside the state in which they were executed.
- *Lack of registration:* Apart from in the circumstances of selling or dealing with real estate when a power of attorney is required to be lodged with the Land Titles Office, there is no requirement in Victoria for powers of attorney to be registered. Lack of registration means that banks are unable to efficiently check whether a power of attorney is current, valid or correctly executed. It is possible for an attorney to hold and use certified copies of a power of attorney even if it has been revoked. There is an absence of a clear protocol with relevant authorities which is sufficient for bank staff to recognise and authenticate documentation, which can create unnecessary complexities and delays in completing transactions. Lack of registration of powers of attorney means that individuals may face complications in conducting their business activities, (e.g. there is no guarantee that a power of attorney will be recognised or accepted by businesses, service providers or other third parties).
- *Differences in interpretations*: Some interpretations of the extent to which a power of attorney can be used for certain decisions differ. For example, an enduring power of attorney in Victoria is intended to relate to financial and legal decisions, however, this may not include all circumstances with respect to accounting and taxation. This can result in complexities for completing financial and business transactions, especially with regards to transfer of assets and property.

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[3] Powers of attorney documents are governed by the *Instruments Act 1958* (VIC) and the *Guardianship and Administration Act 1986* (VIC).

- *Differences in execution*: Some execution arrangements enable limitations on instruments, such as only relating to certain banking products and financial services, and thereby excluding others by their omission. Alternatively, instruments can be executed with accompanying special conditions (i.e. optional clauses). In the absence of clear explanation of special conditions or the delineation of responsibilities of co-agents, this can result in complications for businesses and service providers as it is unclear how powers may be conferred, for what, and to whom.
- *Capacity risk*: In the absence of formal processes for registration and activation of a power of attorney, it can be questionable as to whether the donor no longer has capacity to make their own decisions, and therefore whether the attorney can make this determination and commence acting on behalf of the donor. This can result in commercial and business uncertainties as well as potentially leave the donor vulnerable to exploitation and abuse by their attorney.
- *Fiduciary risk*: Some attorneys may also act in another fiduciary capacity for a donor. Where there is the implementation of an instrument giving a professional adviser the power to make decisions on behalf of their client, this could give rise to a conflict of interest, as the adviser may be required to act in more than one capacity. This can result in administrative and legal uncertainties for businesses and service providers as it is unclear the nature of the relationship to which the business or service provider is able to, or required to, act upon.

Therefore, the ABA believes that it is important for there to be greater harmonisation of instruments, including the terminology used in instruments and forms used to execute an instrument within state schemes and across jurisdictions. Without compromising the ability for individuals to put in place different instruments for different purposes, we consider that there should be broadly two different types of powers of attorney:

(1) Power of attorney allowing the attorney to do everything. This approach would enable a power of attorney to confer powers to enable an attorney to do "anything I [a donor] may lawfully do".

(2) Power of attorney allowing the attorney to make limited decisions as listed in the instrument or make decisions for a specified period of time as contained in the instrument. This approach would address the problem encountered by banks that are required to identify exactly what the attorney is able to do. It would also address the problem where specific powers are provided, for example, enabling the purchase or transfer of property, but fail to cover associated decisions, for example, entering or ceasing a contract for a loan to complete the purchase. Furthermore, it would ensure that individuals are able to put in place temporary arrangements if they desired, but that the default for powers of attorney is that the instrument is enduring.

The ABA believes that forms should adopt a systematic format. For example, rather than making the donor 'cross out' options that are not applicable (and running the risk of overlooking an option and then a default term applies), the donor should be able to 'tick' the options which are applicable. This approach will streamline coverage and formality of instruments based on the use of these instruments across jurisdictions.

The ABA believes that forms must contain all information about the donor and the attorney to facilitate the management of the donor's business and financial affairs. For example, the current form for an enduring power of attorney in Victoria does not contain a requirement for the witness to complete their occupation or define a "prescribed witness". The absence of stating in what capacity the witness is acting means that it is unclear whether the

witness is authorised to take statutory declarations. (We note our comments below regarding execution of powers of attorney being done in the presence of a solicitor.)

The ABA believes that the formality requirements should be amended to facilitate inter-jurisdictional recognition of powers of attorney. For example, the current prescribed form must be completed for an enduring power of attorney in Victoria. The absence of mutual recognition means that the management of business and financial affairs is complicated, especially when a donor has moved interstate and their attorney resides in another state.

The ABA believes that it is important for governments to assist individuals put in place appropriate powers of attorney for their needs and circumstances. Following streamlining of instruments, we suggest that governments should prepare supporting materials to assist educate individuals, attorneys, professional advisers, businesses and service providers.
For example, we consider that governments should prepare interpretative guidance on the extent to which powers of attorney can be executed and used, including:

- preparing and executing a power of attorney;
- limiting the use of powers (including making sure that individuals give close consideration to their business and financial affairs as well as health and lifestyle circumstances, and if optional clauses are utilised, that the instrument clearly indicates what the various options allow their attorney to do);
- choosing an attorney (including the risks that individuals may face with substitute decision making as well as selecting an attorney and an alternate if the attorney becomes unable to fulfil the role of substitute decision maker); and
- acting on instructions from an attorney (including the risks that businesses and service providers may face with recognising and accepting instruments).

The ABA believes that it is important for practices and processes to be adopted that are consistent so that all parties are familiar with the use of powers of attorney.

*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 ABA believes that the execution of powers of attorney should have to be done in the presence of a solicitor[4]. The solicitor should have to declare that the document was explained to the donor and that the donor understood the implications and consequences of what they are doing by signing a declaration on the instrument, and that in their opinion, the individual was of legal capacity. This approach would assist in reducing the likelihood of misuse of powers and abuse by attorneys. If there is doubt as to the donor's mental state at the time of giving the power of attorney, then the document should be similarly witnessed and noted by a medical practitioner. Further consideration will need to be given to issues such as the form of the declarations.

Furthermore, the ABA believes that it should not be necessary for a consular officer to have to witness a power of attorney that has been executed overseas. This can be problematic and a requirement that can often not be met by the donor. Therefore, a legal practitioner duly qualified in the overseas country should be an acceptable witness.

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[4] The ABA notes that there are differences in the list of persons that are authorised or prescribed witnesses across jurisdictions. While recognising the reasons for enabling additional persons to legal practitioners to witness a power of attorney, it is important to ensure that a witness is capable of correctly executing the instrument – that is, in a manner that protects all parties involved as well as facilitates simplicity of business and financial transactions.

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

The ABA believes that a power of attorney should only be activated in the following circumstances:

(1) When the donor decides to activate their power of attorney and seeks assistance in managing their affairs. If there is doubt as to the competency for the donor to make this decision (i.e. a third party suspects that there may have been coercion involved in the donor making the decision to rescind decision making to their attorney), the tribunal should have the power to suspend or revoke/deregister the instrument until an acceptable alternative can be established, which may include the appointment of an administrator.

(2) When the attorney has reason to believe that the donor is, or is becoming, mentally incapable due to illness, injury or accident. If there is doubt as to the donor's mental state at the time of giving the power of attorney, then the attorney should seek the advice of a medical practitioner in determining whether to activate the power of attorney.

The ABA believes that there should be a mandatory obligation on the attorney to register the power of attorney with the relevant state authority (i.e. Land Titles Office/Department of Lands) upon activation. Furthermore, the registration of a power of attorney should revoke any pre-existing power of attorney. This approach would assist in reducing the likelihood of misuse of powers. However, we note that costs for registration should be minimised to ensure that costs are not prohibitive or exclude members of the community from putting in place formal arrangements. Further consideration will need to be given to issues such as ensuring registration fees are reasonable and legal community services are available.

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

The ABA notes that the powers given to a third party to act on behalf of an individual can be enduring, general, specific or limited. The type of instrument and any optional clauses will confer those powers.

Bank customers use powers of attorney in a number of different circumstances, including an individual with capacity is overseas (either travelling or residing), a proprietor of a company, or an individual without capacity in Australia.

*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?*

The ABA believes that there are a number of initiatives that need to be pursued to enhance the use of powers of attorney and improve protections of individuals as well as businesses and service providers working with individuals that have in place powers of attorney.

### National registration

The ABA believes that there should be a mandatory obligation to register an active power of attorney with the relevant state authority. A power of attorney registered in one state should be recognised throughout Australia.

The ABA believes that the Federal Government, in collaboration with state and territory governments, should also introduce a central registry so that instruments registered with a relevant state authority can be accessed and verified. This approach would address a number of problems with the use of powers of attorney and assist banks and other businesses to access information, verify the authenticity of third party arrangements and ascertain the holder of the current authority. In addition, it would facilitate easier management of business and financial affairs as businesses, service providers or other third parties would be able to recognise and accept authorities as registered and powers of attorney would be transferrable across jurisdictions. A central registry should contain details of powers of attorney that have been activated and revoked as well as details of any special conditions, optional clauses or limitations. Further consideration will need to be given to issues such as search functionality, protection of data and privacy.

Furthermore, the ABA believes that there is merit in the Standing Committee of Attorneys-General assessing the feasibility of establishing a national monitoring scheme so that there is a central body with responsibility for monitoring powers of attorney. This approach would promote the integrity of powers of attorney and address concerns with the incidence of financial abuse by attorneys.

### Execution processes

The ABA believes that attorneys, individuals and their professional advisers should have access to the necessary information and assistance to help put in place powers of attorney. Further consideration will need to be given to issues such as the form of guidance for attorneys[5]. However, in the interests of reducing the complexity associated with the prescribed form, we suggest that information should be provided as interpretative guidance.

In the context of banking, an attorney and donor should ensure that the execution of powers suits the needs and circumstances of the donor. Processes could include:

- *Preparing an instrument*: Selection of the type of instrument should ensure that a donor has in place the correct arrangements for the type of business and financial decisions that their attorney will need to make on their behalf. Donors should give close consideration to the assets and property that are relevant to decisions about their affairs. Attorneys should give close consideration to the responsibilities for which they being appointed.
- *Appointment of attorney*: Selection of a third party agent (or agents) should ensure that a donor has in place appropriate arrangements for substitute decision making. Donors should give close consideration to the third party who they decide to appoint, the manner in which they may give instructions for a third party to act on their behalf and how a third party will make decisions after the donor loses capacity to make those decisions. In addition, attorneys and donors should give consideration to alternative arrangements (i.e. in case the appointed third party is unable to fulfil the agency) and accountability (i.e. making sure forms are appropriately witnessed).
- *Limiting an instrument*: Imposition of limitations either as specified conditions or optional clauses should ensure that a donor is able to tailor their arrangements suitable to their business and financial affairs. Where a donor decides to appoint more than one attorney, the instrument should clearly state the preferences of the

[5] An attorney should be required to state that they are over 18 years of age, are not a current paid carer or health-care provider of the donor, have read the appointment and attorney's obligations, are prepared to take on the responsibility of exercising the powers that have been given in the document, and that they must exercise those powers in accordance with the Powers of Attorney Act (as applicable).

donor and how the attorney's may act (e.g. severally, jointly, majority, successively). Otherwise, it should be deemed that either/any attorney will be able to act on behalf of the donor. In addition, where there is a vacancy either because the attorney voluntary vacates or the attorney dies, the surviving attorney should be deemed eligible to continue to act on behalf of the donor.

- *Duties and obligations*: Understanding the responsibilities for which the attorney is being appointed is critical. Donors and attorneys should give close consideration to the administrative and operational matters of the appointment, including accountability (e.g. keeping assets and property separate), transparency (e.g. managing unauthorised transactions and avoiding conflict transactions), rights (e.g. making sure there are clear procedures for activation of the instrument), approvals (e.g. executing documents correctly, meeting legal obligations), record keeping (e.g. retaining a signed copy of the appropriate form), other arrangements (e.g. looking after dependents and/or beneficiaries). An important notice should encourage attorneys to seek further legal or financial advice if in doubt of their responsibilities.
- *Revoking an instrument*: Revocation should ensure that a donor only has in place arrangements as needed. Donors should give close consideration to maintaining authorities and orders suitable and relevant to their needs and circumstances (e.g. withdrawing powers by destroying the document and any copies).

### Instruction processes

The ABA believes that businesses and service providers should put in place standard processes for acting on instructions with regards to powers of attorney.

In the context of banking, a bank should adopt consistent procedures for verifying the legitimacy of third party arrangements and ensuring that their customer is gaining a benefit from the completion of the banking transaction. Processes could include:

- *Internal controls*: Compliance procedures should ensure authenticity of instruments and legitimacy of attorneys. Administrative practices should enable banks to delegate level or position descriptions to facilitate use of powers of attorney. Banks should adopt a common approach to responding to the presentation of instruments by attorneys.
- *Acceptance policies*: Transparent and accountable policies should ensure that the bank acts on instructions or makes a determination not to act on instructions, including circumstances where banking practices would not permit the use of powers of attorney (e.g. guarantees). Banks should give close consideration to operational matters, including use of POA nomination forms, citing of original documentation, recording of special conditions or instruments, storage of customer information. Banks should make available information about any specific practices used in relation to powers of attorney.
- *Lodgement of powers of attorney*: Lodgement with the Land Titles Office should ensure that a permanent record can be kept so to avoid the need to produce a certified copy with each financial dealing. Banks should pursue improvements to practices so as to minimise costs and complexities for banks and their customers.

### Revocation processes

The ABA believes that governments should make it compulsory for all revocations of powers of attorney to be registered. Revocation should ensure that a donor only has in place arrangements as needed.

Furthermore, the ABA believes that:

(1) in the case of powers of attorney where the donor is a natural person, the registration of a power of attorney should automatically revoke any previously lodged power of attorney.

(2) in the case of powers of attorney where the donor is a corporation, the registration of a power of attorney should not automatically revoke any previously lodged power of attorney, as this may create operational and business transaction risks for corporations and their counterparties. From a practical perspective, it can take time in a large organisation to implement a new power of attorney once registered, in terms of communication, education and appointment of new attorneys. Therefore, it is preferable for a corporation to have control over the timing of revocation of the previous power of attorney, rather than it occurring automatically upon registration.

**Criminal sanctions**

The ABA believes that the law should be amended to introduce criminal sanctions to prevent the attorney from engaging in acts where their own interests are put ahead of that of the donor as well as prevent an attorney from misusing their position to their own advantage. This approach would not merely dissuade an attorney from recklessly or knowingly abusing the donor, it would create a criminal offence for such abuse. An attorney should be legally obliged to act in the best interests of the donor. We consider that there should be standardisation of laws governing powers of attorney so as to overcome jurisdictional barriers. Further consideration will need to be given to issues such as ensuring appropriate limitations of the offence[6].

Furthermore, following implementation of criminal sanctions and standardisation of laws, we suggest that governments should prepare supporting materials to assist educate attorneys and donors. For example, we consider that governments should prepare interpretative guidance on administrative and operational matters of the appointment as well as the moral and ethical obligations of the appointment, including:

- exercising the powers of an attorney in an honest manner;
- acting with due care and reasonable diligence in protecting the interests of the principal;
- ensuring consistent procedures for verifying financial arrangements;
- conducting transactions in a manner that ensures that the principal is gaining a benefit from the completion of the transaction;
- managing conflicts of interest (i.e. not conducting a transaction which may involve a conflict between the attorney's interests and those of the principal);
- ceasing to act as an attorney upon request by the principal; and
- managing risk of liability and/or compensation.

[6] A business or service provider should have certainty that the wrongdoing of the attorney does not implicate or extend to the business or service provider where the business or service provider has acted in good faith when acting on instructions and dealing with the attorney.

### Education

The ABA believes that many people are not aware of the importance of putting in place powers of attorney. While some people are aware that they should have a will and an estate plan so that their estates can be administered and distributed to their beneficiaries upon their death, many people do not plan adequately for the possibility of losing mental capacity through illness, injury or accident and suffering a lifetime disability.

In the banking context, governments should undertake initiatives to raise awareness of powers of attorney and improve the use of these instruments. Initiatives could include:

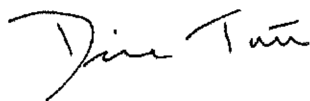
- *National campaign*: A community awareness raising campaign and consumer education campaign should facilitate greater use of powers of attorney. However, a thorough community education program should not promote the use of powers of attorney without also providing information about the benefits and disadvantages of unlimited agency powers created by some authorities. For example, research shows that older people have a limited understanding of the nature and meaning of the signed instrument and have expressed some frustration with third party arrangements. Older people must have the capacity to understand the nature and effect of the power.

- *Information package – members of the public*: Developed by the Federal Government, in collaboration with the Human Rights and Equal Opportunity Commission, state agencies/authorities, and banks, an information package on good financial practices should reduce the likelihood of financial abuse. For example, a brochure could include information on banking for older customers, managing a bank account and money on behalf of someone (e.g. generic information about financial abuse), differences between instruments and orders, requirements to open and operate banking products (e.g. ID and proof of legal right), business protocols for dealing with legal and banking matters and available support services (e.g. counselling or community support services, relevant authorities, consumer protection agencies, and legal support services).

- *Information package – banks*: Developed by the ABA, in collaboration with the Human Rights and Equal Opportunity Commission, state agencies/authorities, an information package on banking services for older customers and customers with a disability should improve accessibility to retail banking. For example, a training program for bank staff could include relevant information about financial abuse, decision making disabilities, differences between authorities and orders, third party arrangements, identification and verification procedures, and authentication of instruments.

The ABA would be happy to discuss any of the issues raised in our submission with you further.

Yours sincerely



**Diane Tate**