

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 22 October 2009

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Mr D. Fara, Deputy President, Association of Independent Retirees.

The CHAIR — I welcome this afternoon David Fara from the Association of Independent Retirees and thank him for the submission he provided. I advise that evidence taken at this hearing is protected by parliamentary privilege. That is covered by the Constitution Act, the Parliamentary Committees Act and the Defamation Act in Victoria. Any comments made outside this hearing will not be provided with that protection.

Hansard is recording our discussion this afternoon, and you will subsequently be provided with a copy of the transcript. We have just on half an hour, so we will leave it to you to address your submission, after which we may wish to raise a few matters with you.

Mr FARA — As you stated, my name is David Fara. I reside at 3 Atrium Drive, Ballarat North. I am Deputy President of the Victorian Division of the Association of Independent Retirees. Thank you for the opportunity to speak to our submission. As the peak body representing self-funded retirees, we are vitally concerned with powers of attorney as our members are of the age where people often have the need for such instruments. Enduring medical powers of attorney are our main concern, and that is why we suggested that this inquiry's terms of reference should be extended to cover that area.

Our members are avid travellers, and with up to 25 per cent of members of some branches joining the winter exodus to Queensland for periods of up to three months, there is often need to provide a financial power of attorney to someone remaining in Victoria during their extended absence. This normally causes no problem. Our concern is that if the need to use a Victorian power of attorney arises interstate, will it be readily recognised?

Financial powers of attorney are generally accepted once they are recognised as such. Enduring medical powers of attorney are a grey area, and as our members could have to rely on them when interstate, multiple documents are often drawn up to remove that anxiety and the confusion as to their legality can cause. We believe that the entire administration of all powers of attorney should be transferred to the Commonwealth Government to remove these inconsistencies. We may be totally outside the terms of reference, but that is our members' main concern.

It is a very simple submission. We are all volunteers and we have no research staff, as such, so we are just relying on input from members and their anecdotal evidence. That is where we are coming from.

The CHAIR — That anecdotal evidence is very valuable to us, and that is why we appreciate you coming in here with it. You probably have a lot of experience that we would benefit from. On that point — and I know you do not have a body of research — what is your sense of the take-up of power of attorney documents by self-funded retirees in Victoria?

Mr FARA — I think there is a very high percentage of the financial documents in particular. As I said, there is an exodus out of Victoria in the winter, and virtually all of those people seem to say that they have given the son, the daughter or someone power of attorney to look after their affairs in Victoria at the time. What we have found by discussing it is that a lot of people do not recognise the vulnerability they have in that if something happens to them — and it is not an enduring power; they just say, 'It is only for three months' — and suddenly they become incapacitated, they are left in limbo because that first one becomes void. That is an education problem — I think a lot of people do not realise that. One of our suggestions is that in the preparing of documents there should be a clause where they acknowledge that this power of attorney will become void if they lose capacity, so it is almost a suggestion that they look at an enduring power.

The CHAIR — On the one hand, your observations are that there is a high take-up, particularly among self-funded retirees who travel.

Mr FARA — Yes.

The CHAIR — And they do that on a short-term basis. But on the other hand, there is a low level of appreciation of the details of it. From the perspective of your membership, what might be an effective education campaign? What would you like to see in something like that?

Mr FARA — I think a little bit of a combination of the documents, maybe, so they are multipurpose documents, somewhere where you say, 'Here's my medical power', 'Here's my financial', 'Here's my guardianship'. The guardianship and medical particularly seems to be very misunderstood. People are not

drawing the conclusion, that they have to have a guardian. They say, 'I've got a medical one, and he can look after me if I've got to move into a home and do whatever there is to do'. I think that our people just do not seem to grasp that at all, or a lot of people you talk to do not. Our members are fairly savvy, and most of them are still quite active and alert — all the ones we see in meetings et cetera. They have been in business and fairly strictly looked after their future, so that they are not — —

The CHAIR — One of the ways might be, for example, through TV ads. What are the kinds of organisations and structures that your members participate in that could be used as conduits for information? You also said that one of the ways of educating people is to change the forms, to alert people to the implications of signing a particular form and what that might mean. That is one way. What might some other ways be?

Mr FARA — I think our organisation very much relies on guest speakers at meetings. The branches are Australia-wide and most of them meet monthly, and they would have a guest speaker each month. Actually a lot of this started when the Law Institute were doing seminars last year. In one of the documents they handed out — it was not on the topic they were dealing with — the issue of powers of attorney came up and they highlighted some of the facts; so I think guest speakers. One of the easiest ways to get to a lot of people these days is if you have guest speakers at Probus clubs. We are just astounded. We struggle for membership. Our membership is getting older and falling off at one end and we are not replacing them. People in my age bracket are very rare. Probus is growing at an exorbitant or incredible rate. I would say to anyone who wanted to get a message out to get it out through Probus. They seem to be the growing community body at this stage.

Mr CLARK — I raise the issue of capacity at both the time of making an instrument and the time it kicks in. I see you talk about having capacity verified by a medical practitioner or someone capable to witness or verify a passport application. We have had other arguments put that only a lawyer or a registrar of a court should do it because it is a legal test and they need to apply a legal test. I would be interested in your views on that. Then, in terms of the point of when it kicks in, do you believe that the instrument should take effect only when someone becomes incapacitated, or immediately, or it should be up to the person making the appointment as to when it takes effect?

Mr FARA — On the last one first, I think that you should always be able to nominate the events and when it kicks in. It could be on reaching incapacity or at a time or whatever. Towards the end of the last person talking, I heard that they would like to see it still being easy to make. That is right, because we allow chemists, doctors, policemen, accountants and lawyers to witness other fairly important documents. Provided that one of the people testing capacity was their medical practitioner, a second independent person to test that might be sufficient.

We had concerns, particularly with medical — because we were talking medical and that is not this brief, I know — that there might be needs to act quickly. To determine incapacity, and therefore the power of attorney kicking in, should be almost only medical at that stage, if it is a medical power. Guardianship would be very similar to medical, I think; the capacity judgement there has to be made by a medical practitioner, I would think. It is very hard for lawyers or anybody else to make that decision there.

On financial, it is strange coming from a financial background, I believe that the financial ones are possibly the least complicated to worry about, even though they can cause bigger grief in families than anything else.

Mr BROOKS — I have a couple of questions. One is that we have had a lot of evidence today from people who were citing examples of abuse of powers of attorney, where the attorney might have gone off and sold a house without the donor's consent and stuff like that. I want to know if you have any evidence or examples to give of cases like that. Secondly, one of the methods to combat that which has been put up, and which you have highlighted in your submission, is registration, although your proposal I think is voluntary registration. Do you see a small cost associated with registration being a major problem?

Mr FARA — There are obviously going to be administrative costs. That could be a deterrent, but I believe that enduring powers is such an important document that people would be prepared to pay for the little bit of satisfaction and ease of mind that registration would give them. It would give greater validity and certainty to the document. After years in financial institutions, some of the documents that came to me as supposedly a power of attorney were very vague or very informal or whatever, and I made decisions on them really on the matters in the case and the money involved. It was possibly not worth chasing some of the things, but on the

medical ones I think that registration would be quite good. Also make it a lot easier for the hospitals, doctors or whatever, if they have a registered document that is there and virtually proved to be valid.

Mr BROOKS — Have you heard from your members about any examples of powers of attorney being abused?

Mr FARA — No. It is not a major concern, I do not think. I have heard about other things. The guardianship seems to be one that causes a lot more problems than anything else. That is what the general community talk of. I would not have numbers or anything.

Mr FOLEY — You have dealt with it in a roundabout kind of way, but building on what Colin was just suggesting around the voluntary nature versus the mandatory nature of registration, what do you see as the particular advantages of a voluntary system as against a compulsory registration system, given that we are getting really conflicting advice from different groups?

Mr FARA — I suppose my theme was not really suggesting voluntary, but more coming towards mandatory. The biggest thing was that it should not be invalid, just because it has not reached registration. The time between execution and registration was more the bit there.

Mr FOLEY — So once you have a signature on it, it is on?

Mr FARA — Yes, it is valid, but registration then makes the administration of it a lot more legal, whether there is a 30-day or some other time period or whatever there. I think the registration was more for the ease of use of the document. Because the enduring powers are so important, I think it is worth the inconvenience of registration. Our members would not have any objection to that, I do not think.

The CHAIR — The other matter we want to raise with you is that it has been drawn to our attention that some third parties, like banks, for example, sometimes do not recognise power of attorney documents. Is this what your members are saying?

Mr FARA — We have not had terribly much of that, but I could say that from 35 years in the finance industry, it is very hard sometimes to recognise what the document you are being presented with is, if people have gone onto the net and copied it out or copied someone else's and changed names. Again that is where registration would be good. You have got a government stamp or whatever. We were presuming government registration, not certification by a solicitor or some such thing.

The CHAIR — You say implied in registration would be making the documents uniform and consistent.

Mr FARA — Yes, and again it would be very recognisable as such. As I said, in our organisation often the decision is: is it really a power of attorney or is it just someone's wish that the son would come down and do this transaction? A lot of them are more like authorities to operate. I think people would not be considering them powers of attorney, but when you looked at them, they really were powers of attorney.

The CHAIR — I understand all that, but do you get any evidence from your membership, and there is your own experience in the finance industry, that banks and financial institutions, for example, have difficulty recognising that that is a problem for attorneys and principals?

Mr FARA — I believe there is a problem there, yes.

The CHAIR — A number of the submissions that we have received also say that legislation should set out principles as a guide for attorneys, to guide their actions. An example that was given is it would require them to act in the best interests of the principal or to act in accordance with the donor's wishes. There are two slightly different concepts there. Do you think such sorts of guiding principles are required to be in the legislation, and if you do, what do you think they should be?

Mr FARA — You would hope that the person you are granting the attorney to was someone you trust and that they would be acting in your best interests. I believe there should be an overriding legislative requirement, possibly like the Corporations Law, that you act in the best interests — whether it is the best interests or in accordance with the wishes. As you say, you would believe there could be a conflict there as to what are the wishes and what are the best interests. I am not quite sure which side you would come down on with legislation.

Under companies legislation, directors are required to act in the best interests of the company. That is very much part of the statute, and there should be some requirement like that.

I was listening to the previous speaker, and powers should be defined in legislation as widely as possible so that any attorney has these rights and duties, but then the document can strike out the ones you do not want to apply. I would rather see that they have more powers than it suddenly be found that they have been given a restrictive document that does not cover the needs at the time.

The CHAIR — Have you been able to give any thought to what you think they might be?

Mr FARA — No. Again, mainly because we were looking at the medical, we thought the medical power was fairly well defined at present — but no, I have not given any thought to that.

The CHAIR — Some submissions to the inquiry have also supported the idea of periodic but random audits of attorneys' accounts, for example, or requiring them to lodge annual statements. Do you think that is a positive thing to do or is it too onerous?

Mr FARA — I think it would be too onerous except in very high-value cases, but then again I think the higher the value, the more they have got other things in place with accountants and solicitors, and there would be other people keeping track of the attorney as well. But on lower value instances, I think it would be very onerous.

The CHAIR — I presume by 'lower' you mean lower in terms of the finances that are involved?

Mr FARA — Finances, yes; sorry.

The CHAIR — But even a relatively — by some persons' estimate — small amount of money can have a very large impact on a person's life.

Mr FARA — Yes, very much so.

The CHAIR — So does it matter that it is a small amount of money?

Mr FARA — That is a very good point. I am just thinking more of the administration of it and the cost to run it, but I suppose it certainly would not hurt — just thinking off the top of my head — if an attorney knew there was a chance that the auditor would come knocking on the door. Audit and snap inspection would be more beneficial than trying to impose a reporting regime. Again, that is more speaking from 35 years of reporting to authorities, that inspection is a very good tool to make sure you are always right. Reporting can be not the most accurate.

The CHAIR — We are right on time, so could I thank again for your submission and for coming today. You will be provided with a copy of the Hansard transcript. You can make small changes to that, but obviously substantively it will have to stay the same. I hope you would be open to Kerryn or Kerry contacting you with any further questions or matters you might be able to clarify.

Mr FARA — Yes, no problem at all on that. Thank you for the opportunity.

Witness withdrew.