

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### Inquiry into powers of attorney

Melbourne — 22 October 2009

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|                 |                 |
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#### Witnesses

Mr A. Fitzgerald, Managing Director,  
Ms A. Burton, General Manager, Personal Financial Solutions, and  
Mr A. Craig, Senior Corporate Lawyer, State Trustees.

**The CHAIR** — Thank you very much for coming this morning and for your submission. There is one more preliminary that you would probably be aware of, but I will step you through it anyway. All evidence taken at the hearing is protected by parliamentary privilege and that is provided for under the Constitution Act 1975, the Parliamentary Committees Act 2003 and the Defamation Act and, where applicable, the provisions of reciprocal legislation of other Australian states and territories. Any comments that you make outside the hearing may not be afforded such privilege. Hansard will be recording our discussion and you will receive a copy of the transcript after the hearing.

We will leave it to you to set up and introduce any matters that you think we should focus on particularly and we will have some questions and discussion after that.

**Mr FITZGERALD** — We wanted to make just a few points as part of the introduction. I guess in terms of the review there are a couple of things we would like to see as potential outcomes of the review. One is recognition of the cross-jurisdictional issues that exist in Australia, given that we have a very mobile population and that documentation and so on should have effectiveness in other jurisdictions and vice versa, so that we get a document that is usable throughout the Commonwealth. There are a number of other pieces of legislation also being reviewed, including the Guardianship and Administration Act. That review is being run by the Victorian Law Reform Commission. Some sort of alignment with that would be a sensible outcome, from our perspective.

I guess protection for the donor is another issue that we saw as important and that there are potentially opportunities to boost the protections that are available across the issues of witnessing. Review of the conduct of the attorneyship is another issue on which we saw that further work could perhaps be done. There is the issue of registration, whether we want a register of executed documents that are available for inspection at some level, but obviously wanting to make the process as smooth as possible and not make it too unwieldy in terms of recognition of the three types of powers of attorney. We specialise in the financial-legal one, and that is what we are set up by the shareholder to do. We saw that as a benefit. Obviously, with the document that the donor executes and that the witnesses are involved in, we do not want to make that *War and Peace* either, in terms of all the necessary bits and pieces that have to be included in the document.

They are probably some overarching points that we want to put on the table from our own experiences in administering 700 EPAs as part of our normal business. That is our introductory statement.

**The CHAIR** — Thank you. Angela or Alistair, do you have any comments at this stage?

**Mr CRAIG** — Just reinforcing that last point, obviously a lot of the discussion might be around the ability to combine the existing three into a composite form which we would not oppose as an option, but we still think a stand-alone enduring power of attorney (financial), is going to be of value in most cases. We find that for, say, 20 enduring powers of attorney (financial) that we make, we would make only one guardianship enduring power and probably even fewer for medical treatment. To compel people to combine a guardianship form with the financial form is probably adding, in most cases, more material to the document than would be necessary. We would support there being a continuance of a stand-alone enduring power of attorney (financial).

**Mr FITZGERALD** — A lot of that is off the back of the organisation being set up to manage financial and legal powers of attorney, and we have expertise in that area in terms of the consultants we employ. They make financial and legal decisions. Lifestyle decisions is not something they are trained in and not something that we are resourced or funded to do, so making a decision about where a person lives is something that is part of a guardianship power of attorney. Whether they can afford to perhaps delves into the realm of where we are, and we are happy to obviously have input into that, but whether or not the quality of the accommodation is appropriate for the individual in terms of the level of care that is necessary, and stuff like that, probably is something that is beyond our skill set to advise on.

**Ms BURTON** — The current legislation does not allow us to stray into that area. We would defer to OPA as the court-appointed guardianship attorney, and we would certainly have input into whether or not financially they could afford to, but in terms of the quality of the accommodation and whether it is suitable for that individual's needs is something we would defer to OPA on in that case.

**The CHAIR** — Perhaps I can draw on your experience. We realise that there is a dearth of data around, so we are really just asking you to reflect a bit. We are interested in the levels of the use of power of attorney documents, and appreciating that you deal with only one set of that in the main, to what extent do you think that

powers of attorneys are used in Victoria, and inside that, are there any groups that have a low level of use of it or low take-up?

**Mr FITZGERALD** — We manage 700 powers of attorney on behalf of clients. There is probably an even split between those that have capacity and those that do not. A person who does not have capacity is one who probably cannot provide advice on their own financial and legal decisions, and we would then take over that and try to make the decisions on their behalf, but we would not do that until there was some sort of medical confirmation that that existed. The other half are people who still have testamentary capacity and can provide advice.

**The CHAIR** — How do they know about you?

**Ms BURTON** — We have people out in the community who go to hospitals and work with social workers, so they are known in the community and are called upon and asked to go out and help someone who often has had a fall or an accident. I do not think an elderly person who is 80 years old wakes up one day and says, ‘I can’t manage my own financial affairs. I am going to call State Trustees’, but they end up having a fall, end up in hospital and may not have any family or friends to turn to, and they are a lot of our clients. We actually go to the hospital, because of relationships that we have with the social workers, and will then activate an enduring power of attorney, under their instructions, so they have to have capacity. We will have witnesses appropriate for that. But often they do not have anyone else, or there could be family conflict, or the family live interstate, or there is no-one around to support them.

The benefit of going out and supporting them is that we can help them to get back home if they need to work with a social worker. If they cannot go home, we arrange for nursing homes and things like that to be looked at, so we take their instructions and act on their behalf. I think most powers of attorney have historically been put in place to manage when you lose capacity — not to work with you while you have capacity — and that is probably one of the key areas that we are promoting with our community social workers: ‘You are getting a bit older. Do you need some help? We can help, and we do only what you tell us to do under the power of attorney’. I think that is a bit different to the way the legislation was intended, but I think it is a bit of try-before-you-buy, and you are independent, as an organisation, that will act in your best interests and take instructions.

**Mr FITZGERALD** — We would also, as part of the business that we do when people write wills, encourage them to also write a power of attorney. So when they come in and think about, ‘What happens to my estate after I die,’ which obviously is covered by the instructions that are contained in the will, at the same time we would actively encourage people to write an EPA, so that if they have an accident that takes away their capacity or testamentary capacity, then there is an EPA in place that can step in and look after their financial and legal affairs if they are incapacitated. So as part of our message that we take the community through the advertising, through the social workers, we would encourage both to be written at that time. We can write all three powers of attorney documents — financial and legal, and we can also write a medical and write a guardianship — but we only administer financial and legal, because that is how our legislation directs us.

**The CHAIR** — Of those people, for most of them you are the support of last resort in the way that you were describing, Angela. What proportion of people who you support would have come to you not in that situation? They would have just rung up because they want you to assist them, and they are otherwise empowered?

**Ms BURTON** — It is hard to quantify. We have a lot of people who have grown up who may be a power of attorney for their father and want help and do not know what to do, and if they have got capacity, they may want to relinquish and want to pass it on, but they cannot under current legislation, so some people go on the website. I cannot give you the exact statistics. A lot of them do not know about powers of attorney, I think, the legal end. VCAT is the last resort when they lose capacity, so educating about, ‘While you have capacity to put something in place’, just prior to maybe something going to happen, is what we try to educate the community to do.

**Mr FITZGERALD** — There is not a lot of market information around the level of use because we can only speak in terms of what we write. We would write between 3000 and 3500 wills each year, and probably about 500 EPAs that are dormant until such time as they are activated by the individual or if the person loses capacity which then triggers the activation as well.

**Ms BURTON** — Last year we wrote 200 enduring powers of attorney in the last financial year; 80 per cent do come through the community channel, so they are referred by someone who is educating the community to help somebody; 20 per cent have come via public direct.

**Mr CLARK** — Following on from that, I have a couple of quick questions about abuse. Do you have any views about whether it would be better if enduring powers took effect immediately rather than when incapacity arises? In other words, you do not have to test for incapacity; you can operate under a power before the person loses capacity. Is that something you think would be beneficial or do you think it would be better to retain an incapacity test before a document like that comes into effect?

**Mr FITZGERALD** — Our primary guidance would be when a person writes a will that they should also write an EPA, so it is while they already have testamentary capacity.

**Mr CLARK** — Sure, but then it does not come into operation until they lose capacity?

**Mr FITZGERALD** — No, it could come into operation. They could trigger it before they lose capacity. They could say, ‘Look, I cannot be bothered looking after my own financial and legal affairs’. They might have physical incapacity, but not necessarily mental incapacity, so they might decide that it is easier for them if somebody else collects all their income and pays all their bills. You can activate it at any time, so our primary position would be that we would encourage people when they write their will to write an EPA, leave it to sit there and if you want to activate it, you can. If you cannot, it does not matter. It is there and it is available, and it is a precaution potentially if, in a very sudden instance, you lose capacity. It is there as a protection, and certainly I know in the instances that go before VCAT, they are very keen to make sure that they follow the wishes of the testator, or, if there is a power of attorney in existence, they would much prefer to follow that and have that operate rather than go down the path of a represented person where there is a court-appointed administrator and that kind of thing. So that seems to be the general philosophy from within the government agencies.

**Mr CLARK** — In relation to fraud, do I take it from what you say about caveats that at the moment a power of attorney holder cannot lodge a caveat in the name of the donor of the power, and if so, what is stopping that?

**Mr CRAIG** — In effect, it is my understanding a policy decision at the titles office. They are not equipped to assess ‘soundness of mind’, which, I think, is the terminology in respect of a Queen’s caveat, or ‘unsoundness of mind’. They defer to a VCAT order because that would have to have established at least that the person had a disability and because of the disability was unable to manage some or all of their affairs. If someone fronts up with an enduring power of attorney, it does not on its face say, ‘And this person is incapacitated’ or lacks ‘legal capacity’ within any particular definition. You might have the person bringing a medical certificate, but there has been no separate objective assessment of that, so it is an understandable policy decision. We cannot progress beyond that with the titles office.

**Mr CLARK** — Would you support VCAT having a general power of ordering restitution in cases where VCAT finds that there has been abuse of power by an attorney or guardian?

**Mr CRAIG** — That would obviously be a novel development, and you would be perhaps putting in VCAT’s hands powers that it is not used to wielding at the moment. You would obviously have questions of procedural fairness and so forth, so that might be a better process through the courts. In theory that might be something that could be dealt with perhaps, up to a certain quantum, because it is very difficult to actually recoup moneys.

**Mr FITZGERALD** — Can I just pick up on that and make a point? In our experience, by the time VCAT is involved it is too late. In cases of abuse, the attorney has already misappropriated the money and transferred it out of the name of the donor into their own name or family’s name or whatever. It is shutting the gate after the horse has bolted — that would be our observation on that. Sometimes we are appointed by VCAT as administrator to try to recover the situation, but in the majority of cases we would find that it is too late — the money has been misappropriated already and it is gone. Of course then the person has no money with which to pursue the person who misappropriated the funds; they have got no money to fund any sort of legal action or that kind of thing. They are unfortunate circumstances in that sense.

**Mr FOLEY** — Your argument at the start about trying to make sure that different jurisdictions across the Commonwealth and the states are aligned in this area — —

**Mr FITZGERALD** — I think that is more about recognition of documents.

**Mr FOLEY** — It is as simple as that; not complementary legislation?

**Mr FITZGERALD** — I think achieving complementary legislation might be a utopian outcome in that sense. Our view would be that the documents are recognised and that the documents are subject to the legislation that applies to that kind of document in each state. We are not asking for legislative changes, just recognition of the document and the fact that it has standing within all of the jurisdictions throughout the Commonwealth. I think that is probably what we are after. If a person comes to us and they reside in Victoria but they execute a document in Queensland, that applies, but we administer it under the legislation of Victoria, and it works the same the other way.

**Mr FOLEY** — And that would be your goal hopefully from the foreshadowed Standing Committee of Attorneys-General?

**Mr FITZGERALD** — Yes. That has been a policy that the public trustees, certainly from around Australia, have put before SCAG. Yes, absolutely, we would like some sort of document. Some of the other agencies involved would also like that. I know VCAT supports that view and so does OPA as well.

**Mrs VICTORIA** — In the scenario of supported decision making where obviously you are looking at what the wishes of the donor are, how do you juggle and where do you make the decision as to what is in their best interest versus what their wishes are?

**Mr FITZGERALD** — That is a very good question. In a lot of cases they are one and the same. Acting in the best interests of the client is also probably aligned with what they want. The other thing I would say is sometimes you have to make a call and make a different decision potentially because the client, due to their mental capacity, is not getting rational advice or making rational comments, and you would look at what is best for their interests. We would make an assessment of the person's asset position, their financial capabilities, what their requirements are, how old they are, what their risk appetite is in terms of the types of investments we might make on their behalf. That package of assistance then would go to a financial plan that we would put in place for the individual.

Sometimes if we start off a relationship under an EPA where they have capacity, you build up an experience with that client and you know what their preferences are, so if they do lose capacity and we continue on with that relationship, you would just continue on with implementing their preferences because you have built up that experience and you have got records on the file and that kind of thing about what their preferences are.

**Mrs VICTORIA** — Are those decisions often challenged? I see Alistair nodding.

**Mr CRAIG** — VCAT is very busy with that sort of issue where effectively a substitute decision has been made or has been decided upon and other interested parties are saying, 'Actually, that is not what the represented person (if it is in an administration order situation) wants or would have wanted because they are no longer capable of expressing themselves' and so forth. Obviously the legislation in a sense is talking about guardianship, and administration is skewed towards protection of property. You would have to say that the general law position, in terms of attorneys, is also skewed towards protection of property. Notwithstanding that a person might say, 'Give away my house, my car, to nephew X', the attorney cannot actually do that in a situation where the capacity of the donor is in question because the attorney would be exposed to being sued for having alienated the property of the donor.

**Mrs VICTORIA** — Is there something that we can do, obviously through the process that we are going through now, to help simplify or rectify that or make it clearer to people that that is the obligation that is there, that is the onus that is on them?

**Mr CRAIG** — I think you are going to have to look at what powers VCAT can actually bring to bear to protect an attorney who is wanting to go down those sorts of paths. I do not have the impression that VCAT thinks that it can holus-bolus approve alienation of property. Maybe you have had submissions to the contrary.

**Mr FITZGERALD** — Can I just add, acting in our capacity as administrator for a represented person, which is a different group to those who operate under a power of attorney, the current legislation enables us, if there is what we believe might be a contentious decision, to dispose of property. Hypothetically, a represented person might need to move into some sort of level of care and requires an accommodation bond, and the only way they can afford that is to sell the family home. That obviously can create tensions within families particularly if our client has made a will which has left that property to one of the children. What we are able to do is go to VCAT and say that we want to dispose of the property and use those funds to pay the accommodation bond to enable a client to go into a certain level of care because of the fact that they cannot look after themselves, they cannot stay at home. That decision has been taken by someone else, à la OPA under a guardianship situation. We would go to VCAT and ask, ‘Can you authorise us to go ahead and take this action?’. We are protected then by VCAT.

We think that is a very important part of the current process that we use to protect ourselves in making that decision. We certainly want to see that retained from that perspective because it does help. The other thing it does is also give the opportunity for a family member who might want to take issue with that decision to go and have themselves heard at VCAT under that same process. We think that is a very good protection and certainly we would encourage that being retained.

**Mr BROOKS** — I have a general question, a similar question to the one I asked of our last witness. Your submission talks about registration and increasing witnessing requirements so that at least one person can sign affidavits, and a suggested no-profit conflict rule. There is that question of balance between encouraging people to take out these agreements and on the other hand ensuring they are not abused. Have you got a comment on that?

**Mr FITZGERALD** — Yes. We have some intelligence around this. In Tasmania you have to register a power of attorney. You also have to register revocations — if that document is being revoked by the donor, that has to be registered to take effect as well. That is the kind of process that we would probably support, with some protections. There is not a lot of information around as to whether or not that has discouraged people from making EPAs and whether or not some people may be deterred by the fact that you have to register them to stop people from taking them out because they do not want the authorities, I guess, to be made aware of the fact that there has been an EPA made and it has been registered and that kind of thing. We cannot gather that information as to whether or not a person says, ‘Because I have got to register it, I am not going to actually make an EPA’, or the family discourages them from doing it or whatever. But certainly there is a registration process in Tasmania.

**Mr BROOKS** — Just on that question, you mentioned Tasmania; is there a piece of legislation, whether interstate or overseas, that you think is a good model piece of legislation for us to look at?

**Mr FITZGERALD** — As far as I am aware, Tasmania is the only state that applies for registration. Since the early part of this decade we have become aware that the Japanese government has moved into this area. One of the issues they put into their documents, which I thought was a good one, was when the power of attorney document is executed, the donor has the opportunity to nominate a person who they wish to review the conduct of the attorneyship. So there is a capacity within that document to nominate somebody — it could be anybody — to oversee and review the conduct of that attorneyship.

I thought that was a very good development and something we should perhaps throw into the mix to be considered. The question then of course is: if it is somebody professional, what are the responsibilities and what are the costs — that kind of thing — which you would have to evaluate? But as a concept, I thought that was something that was worthwhile considering. So this would be somebody independent that could be nominated as almost like a third-party reviewer. Audit is perhaps a bit strong, but certainly a review or examination of the conduct of the attorneyship on a regular basis would be no bad thing.

**Mr BROOKS** — Do you know if that person could just be another family member?

**Mr FITZGERALD** — It could be. As far as I am aware there was no restriction on who that could be, so you could put one of the big four chartered accounting firms in there if you wished, I guess, but obviously there are costs associated with that that perhaps the majority of people could not afford, but there may be others. It

could be the local solicitor or somebody like that who could step into that role. I certainly thought that that was a good development that we have learnt about through exposure to international conversations.

**Mrs KRONBERG** — Mr Fitzgerald, or whoever feels most comfortable: in terms of the people who are working with you, do you have a proportion of those people who are coming after having had to revoke it through another relationship with another attorney in terms of you being the second port of call? If so, what would have been any triggers for that?

**Mr FITZGERALD** — I will ask Angela to respond in respect of our powers of attorney clients. With our administration orders, which is where we get appointed to look after a represented person, we get a number of appointments to act as a formal administrator by VCAT where they have revoked a power of attorney because it has been brought to their attention that the attorney has been misbehaving. So that would tend to come into it that way. I am not sure we would get many powers of attorney where the donors have had capacity, revoked the power of attorney and executed a new one in our favour.

**Ms BURTON** — I know of one recently.

**Mr FITZGERALD** — There are not a lot — put it that way.

**Ms BURTON** — Yes, there are not a lot. It gets back to education of the community. There was a father who had nominated his daughter. She had three young children. She was busy. She just did not have the time to look after his financial affairs. He was not well; he did not have the time to do so. I think he had heard about our services through someone visiting one of his colleagues in supported accommodation et cetera. So he actually contacted us and wanted to revoke his daughter and appoint us. That is maybe one example. I do not see it a lot. We do have some of our own policies around revocation where we do want proof of capacity. We do not want someone with undue influence revoking ours when they have lost capacity.

We can often tell. We have often got OPA involved on various occasions when they have lost capacity. So having that relationship, if their decision making is starting to change, we can actually seek a capacity statement as well. It is not in the legislation, but our internal policy is to make sure we get a document signed to revoke, because under current legislation it can be verbal. You can say, 'I revoke you', and we do not think that is strong enough. It is more for the protection of the client than for us.

**Mr FITZGERALD** — We tend to find that more of the clients coming into our administration business for represented persons, are where VCAT has revoked the power of attorney. So that is the way we get them in. As Angela pointed out, we get the majority of our clients coming in as represented persons, and that is because VCAT will revoke the family member as the attorney.

**Mrs KRONBERG** — There is the notion out there that some abuse may be unintentional. Can anyone amplify that for me, please?

**Mr FITZGERALD** — Yes. What is the definition of abuse? There might be a situation where a daughter or a son is looking after a particular parent. You know, they do a lot of running around for the client in terms of collecting income, paying bills, which are your responsibilities under the power of attorney. They might take \$10 or \$20 out of Mum's money to pay for petrol. Is that abuse of the financial power of attorney, because they did not specifically ask the parent for it, or not? I mean, we are getting to those kind of grey areas where clearly if somebody has transferred Mum's house into the name of the daughter, because the daughter has the attorney, and they sell the house and use the money for their own ends, that is clearly abuse. But there are some grey areas where you could say that there is justification around spending a bit of petrol money and that kind of thing for Mum, because I am running around doing things for Mum. At the same time I might be paying Mum's electricity bill, but while I am there I also pay mine, and those kinds of things. There is a bit of blurring in terms of the boundaries of abuse; it is not clear cut as such, so we just need to be a little bit careful about it. In most cases most people would say that taking a bit of petrol money might be fine, but in the strict sense of the law you are actually taking it without permission. There is that kind of blurring.

**Ms BURTON** — I mean, it could be a grandson living in the house rent-free helping the grandmother.

**Mr FITZGERALD** — He could be mowing the lawn and keeping the yard tidy — that kind of thing — in return for not paying any rent. Is the attorney legally responsible for making sure that there is an income on that

property that is due, because it is Mum's property and she is entitled to live there, but that might be her preference, that the grandson lives there for security reasons, because she is pleased to have a younger person around the place. That person might mow the lawns, look after the garden and that kind of thing, and that is in return for the rent. So you have got those kinds of scenarios which some people would say, 'Well, you know, it could be abuse', and other people would say, 'No, that is fine; that is a great arrangement'. Again, it is a little bit driven by what we think might be the wishes of the individual. Is that okay?

**Mrs KRONBERG** — Yes.

**The CHAIR** — Just coming back to other jurisdictions, you talked very interestingly about Japan before and then touched on Tasmanian legislation in relation to the register. I think in your submission you mentioned you are not that enamoured of the Queensland legislation around a single document. I think you referred to that in your opening remarks. But given all that, is there a piece of legislation that you could point us to that you think overall is a pretty good model that we could have a look at?

**Mr CRAIG** — Perhaps defining it more in a negative, I am afraid, the manner in which the UK registration works is perhaps something we would be very cautious about in the sense it is almost akin to the person having to make the equivalent of an application for administration in the degree of bureaucracy around it. You might say that that can be justified as a protection for the donor. Our concern I suppose would be the difficulty in efficiency and speed. Sometimes EPAs are required quite urgently, and to add a layer of delay, because they have a process for objecting and so forth, may in some cases cause injustice to the donor. That would have to be factored in if we were going down the registration path.

In relation to our concerns around the form, I think we have already expressed it is practical to retain the EPA (financial). Obviously New South Wales has the combined general and enduring as a model. I am not aware of any that have the option of combining general and enduring, with the option of adding guardianship. That may be out there; we have not done an exhaustive review of the jurisdictions. It may be in Canada or somewhere.

**Mr FITZGERALD** — From my understanding, we have had visits from the Irish and a visit from the Japanese who have gone down the path of copying our supported and assisted decision-making models, and have used us in Australia as a bit of a benchmark across a number of jurisdictions. I think that is a feather in the cap for the country that that is the case. In Canada it is similar. Again, it is a Commonwealth country. The UK has tended to want to have government agencies withdraw from that business altogether, particularly represented persons and that kind of thing, which I would not support. I think that is the wrong approach. I think the approach we have got here in terms of the level of intervention is a good mix.

**The CHAIR** — What are the dangers?

**Mr FITZGERALD** — I think there is nobody to look after the person who cannot afford to pay for it themselves, and I think the government itself in its contribution to the community needs to make sure that the people who cannot do it for themselves are not then left to their own devices to be abused. We have got 9000 represented persons as clients, of whom 7000 probably receive some sort of Centrelink benefit as their primary source of income — across age pensions, disability pensions and veterans affairs pensions and the myriad allowances that hang off those. That is their primary source of income. If we were not there, there would be nobody else to do it, because the family does not want to do it. You will not get a professional administrator to do it because there is no money in it, so we think it is an important safety net that needs to sit under the community here.

The one thing our UK colleagues have with respect to powers of attorney that is different from us is performance bonds, where an attorney, if they act in the capacity of attorney, is required to take out a performance bond, which I think is aligned somewhat to a year's expenditure. What they would do is pay a financial institution a percentage of that as a fee and the institution would issue a bond — a bit like an insurance policy, if you like — to cover one year's expenditure for that particular client. That is a bit of a twist that we do not have that is potentially worth considering as an option for a sort of inbuilt protection, in the instances of abuse. But you would have to explore how that operated. Is there is an appetite on the part of the financial institutions to provide that kind of insurance? Certainly there does not seem to be any trouble in the UK creating that market. There are financial institutions ready to step up and provide those products. That is something else that is a little different that exists in another jurisdiction that we could perhaps look at.

**Mr CLARK** — State Trustees obviously performs a difficult and complex range of services, from trustee or agent of last resort for the people you just mentioned to running a profit centre, as it were, selling your services to those who are able to pay for it. There would be a number of other trustees and professionals, a fairly limited group, who would similarly earn fees from acting as attorneys. How do you envisage the management of a potential conflict of interest between the interests of a paid attorney or appointee and the interests of the principal? You derive revenue that you are entitled to from performing those services, but that can in some circumstances generate a conflict of interest itself. Do you think the current regime is adequate for managing that conflict? How do you manage it, and do you think there are changes that should be made to improve the situation?

**Mr FITZGERALD** — There is an inherent responsibility as a trustee. We have got fiduciary responsibility to always act in the best interests of our clients, and that comes before any issues of remuneration. That is ingrained in us, from the board right through, in the way we operate. I do not see how we could change that in any way. We have got a fiduciary responsibility as trustee to always act in the best interests of our clients. That is our foremost responsibility before it comes down to profit or revenue for the organisation. That is a higher order priority, and we would take that as our first priority.

We would tend to find that acting in the best interests of our clients would always still result in a longer term benefit to the organisation. Short term there may be some differences, but certainly acting in the best interests of our clients is always a better solution long term, and we certainly take that fiduciary responsibility extremely seriously.

**Mr CLARK** — That is the law and the appropriate standard, and I am certainly not suggesting that State Trustees is not seeking to comply with it, but there is nonetheless a potential tension and occasionally one receives allegations that State Trustees will not disperse assets of a client for lifestyle purposes because it is alleged State Trustees wants to benefit from retaining the corpus or deriving the income from the corpus.

**Mr FITZGERALD** — We are certainly aware of those kinds of allegations. One of the things that we are accused of is disposing of assets, particularly property, to enable us to collect the capital commission on that. When a person comes in initially as a client of ours, we tend to find that in a power of attorney sense we would rarely get their full estate to manage. We would get a few of their assets but not the majority of them. Until they develop a relationship with us and get comfortable with the way we operate and develop confidence in our decision-making capability, we would not get all of their assets, so there is that testing-out period.

In the case of a represented person, which is the other group of clients we manage, we would not sell a property purely to obtain a capital commission. If the person is assessed to be best off staying in their own place, then we do not dispose of the property just to get our capital commission. That is a clear policy within the organisation and we police that extremely rigorously. Unless the asset is realised, we do not claim any capital commission. So if staying in their house is the best thing for a person, we would make sure that that happens.

**The CHAIR** — We have only got about a minute left, so we will fast forward. In your submission you say that you do not support legislation that specifies the powers of attorneys and guardians — is that what you are saying there at 55.3?

**Mr CRAIG** — I think the point of that paragraph was just to show that to the extent that you are using terminology similar to that in the Queensland legislation, which talks of relating to the principal's financial or property matters, and then defines personal matters as a legal matter not relating to the principal's financial or property matters, then you have this, I suppose, demarcation dispute potentially between the financial attorney and what is called the guardianship, or the enduring guardian. I think what you might be getting at is the more high-level point around: should the legislation exhaustively state what a, say, financial attorney can or cannot do? I think the risk there is we cannot necessarily foresee all the types of circumstances that will arise in a person's life.

Just by way of example, we did not have binding superannuation nominations until relatively recently. The risk is that you will miss something if you try to specify exhaustively what they can do. There might be points that you can make about what they cannot do. At the moment an attorney obviously cannot make a will on behalf of a donor. I understand that in the UK a different situation applies, although I am not fully abreast of how it works over there.

**The CHAIR** — So you are comfortable with something being in the legislation, but it should not seek to be exhaustive — which was the word you used — but rather something that provides the parameters?

**Mr CRAIG** — Certainly it is always helpful if there is guidance for attorneys, and perhaps the current legislation might be said to be a little bit light on in that regard, but it is hard for the legislation to be couched in that regard.

**The CHAIR** — Okay, thank you for that. The other matter I just wanted to raise with you quickly is returning to the matter of the register. The issue of the cost, I guess, is one element that has been raised with us, and the other one is the issue of privacy. Could you just quickly comment on both or either of those?

**Mr CRAIG** — Obviously given the client base we have we would support it being as low cost as possible where the person is perhaps not able to afford it and would otherwise be deterred, even to the extent of 100 per cent discounting in certain circumstances because you certainly do not want that to be a deterrent. That said, obviously a register is going to cost something to run.

The confidentiality aspect is a really difficult one. It actually detracts from some of the benefits if you cannot see what is on the register. It could be that a compromise could be worked out if that is also going to be a deterrent — people saying, ‘I do not want X son to know that Y daughter is my attorney’. It could be that it would only become public if the donor says it can become public, or if there is evidence that they have lost capacity, for example. But that would require a fairly administrative process to be in place at the registry, and it may well be that somewhere like VCAT — —

It would be complex.

**The CHAIR** — Finally, where do you think a register should be located?

**Mr CRAIG** — If the tutelage of it were to be with, say, VCAT, obviously it would have a central location but it would be able to operate out of court buildings. It may be possible for court registries to be a conduit. Again, it depends on how long a piece of string is as to how much the registry is going to be required to do by way of vetting and so forth. You have the extreme of the UK model versus a fairly light-touch Tasmanian model. Online registration might be an option, again depending on the model that is adopted.

**The CHAIR** — Okay. We are well over time. As I said before, thank you very much for your submission and for your generosity in coming in this morning. You will receive a copy of the transcript. We did not cover everything we wanted to cover so you may receive a call from us to clarify things. Thank you very much.

**Mr FITZGERALD** — Sure. We are happy to come back.

**Witnesses withdrew.**