

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 22 October 2009

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Witnesses

Mr L. Wraith, Senior Manager, Trusts and Equities, Equity Trustees, and

Ms C. Hausler, Manager, Trust Company Limited, Trustee Corporations Association of Australia.

The CHAIR — I welcome Lachlan Wraith and Claire Hausler from Trustee Corporations Association of Australia. Thank you for coming, and thank you for your submission. You will be aware that all evidence taken at this hearing is subject to parliamentary privilege, and that is covered by the Constitution Act 1975, the Defamation Act 2005 and, where applicable, by legislation in other state jurisdictions. Any comments you make outside the hearing may not be afforded such privilege. We have half an hour. We will give you a little bit of time — as much as you need — to introduce the subject, and then we have some matters that we can raise with you and have a discussion. It is pretty informal.

Ms HAUSLER — Thank you. It is a pleasure to meet you all, and thank you for inviting us to be here today on behalf of the TCA. We thought first of all I would read a statement, which has been prepared by the TCA, giving some background about the TCA. Then Lachlan will talk about some of the key issues that we and the TCA believe should be highlighted to you, and then you might like to have some questions around that.

Thank you for giving the TCA the opportunity to offer its views on possible law reforms aimed at streamlining and simplifying powers of attorney documents. The TCA is the peak representative body for the trustee corporations industry in Australia. It represents 17 organisations comprising all eight regional public trustees and the great majority of the 10 private statutory trustee company corporations.

Trustee corporations have been providing wealth management services for over 120 years. Traditional services encompass estate planning and preparing wills; acting as executor of deceased estates; acting as trustee of personal trusts, including testamentary trusts; and powers of attorney. Each year TCA members prepare several thousand powers of attorney for clients, some of which remain in the drawer to be activated if the client loses capacity and some of which are activated upon execution. Members currently manage about \$6 billion worth of assets under active powers of attorney.

The TCA strongly supports efforts to educate the community about the benefits of powers of attorney in managing their financial affairs. As you may be aware, entity-level regulation of traditional trustee company services is about to be transferred from the states and territories to the Commonwealth. At the same time underlying laws dealing with matters such as wills, powers of attorney and administration of deceased estates are to remain the responsibility of the regional jurisdictions. Accordingly, we welcome initiatives aimed at promoting uniformity across all jurisdictions and maximum operational efficiency in the provision of those services.

Mr WRAITH — Thank you, Claire. As Claire indicated, the trustee companies association is a pretty broad body representing a number of different companies in a number of different jurisdictions, and with any broad body of people it is obviously difficult to get unanimity on any but the most basic issues. Where there is not necessarily unanimity amongst the members of the TCA but where we have views we think might be relevant to the committee, we would propose to simply identify them as being our views rather than those of the association so that there is a broader ambit for discussion than that which is simply put forward on behalf of the association itself.

We thought one way of approaching this, given that you have a number of bodies making representations before you and presumably a number of them covering fairly common ground, would be to distinguish between areas that are amenable to a comparatively quick legislative rectification that may be able to be implemented more readily and those areas which perhaps require further consideration and more complicated legislative amendment, on the basis that there are certain matters which we believe could be advanced without the need to wait until everything is done as a package.

Amongst those more straightforward matters we would include, for example, a presumption of a revocation of an earlier power of attorney by a subsequent one. That is currently adopted in the model forms that are published but it is not reflected in legislation. Section 125J indicates that an earlier power of attorney is revoked only to the extent of inconsistency with a later one, and that can create problems. Where particularly laypeople prepare and execute powers of attorney and do not specifically provide for revocation, you have a situation where attorneys coexist.

We are of the view that there should be consistency in the requirements for witnesses between the various forms of power of attorney. As to the question of what the requirement should be for an authorised witness, whether that should be consistent with the requirements for witnesses to statutory declarations or affidavits, there is a

view, and this is not necessarily representative of the association, that statutory declaration is too low a bar, including as it does pharmacists and vets. Anecdotal experience indicates that enduring powers of attorney are particularly witnessed by pharmacists who often are not familiar with the person whose document they are witnessing, who are not familiar with the requisite tests of capacity and do not undertake a thorough inquiry in relation to the capacity of the donor of the power.

The weakness of aligning the test of witnessing with affidavits is that it excludes medical practitioners. Clearly a time when powers of attorney are executed is when people are in hospitals, and it would be beneficial if medical practitioners could be included in the list of authorised witnesses, but otherwise it may be preferable that the authorised witnesses be more consistent with those who are able to witness affidavits than statutory declarations — statutory declarations being in effect more aligned to confirming the signature of the person who is attesting to a document rather than anything further in relation to testing capacity.

The TCA is broadly supportive of there being a witness who certifies not only the signature but that certain matters have been explained to the donor of the power. Currently what is required is that the certification be that the donor appears to have capacity. It is submitted that it may be preferable for that certification to go further and spell out the matters that have been explained to the donor to confirm the donor's awareness of the powers that are being granted and the nature and operation of the document. That would also be a convenient way of the document itself indicating the limits and powers that it confers.

All submissions have noted that as the legislation is currently drafted it appears that only one alternative attorney is permitted for each attorney that is originally appointed. There seems to be no good reason for that, and that would be something that could be rectified fairly readily.

As the legislation is currently drafted there is ambiguity concerning the requirements for revocation of an enduring power of attorney. There is a prescribed form, but also the Act seems to contemplate an oral revocation. The view is that there should be clarity in relation to this and that the same checks and balances to ensure capacity should apply to revocation as well as the granting of a power of attorney.

The issue has been raised in submissions in relation to situations where attorneys sell assets which are specifically gifted in wills. Where an administrator under the Guardianship and Administration Act does that, they are required to account separately for the proceeds of sale, and the proceeds of sale then flow through to the beneficiary under the will as the original gift would have. There appears to be no reason why the same principle should not apply in respect of the sale of assets by administrators.

There is some uncertainty surrounding the meaning of the term 'instructions' under section 118(2) of the Act as opposed to the terms 'limitations' or 'conditions', and it may be useful if there was clarification of that term if it is to be used in the legislation.

That is a summary of the matters that we think might be addressed fairly readily and are probably all fairly uncontroversial.

Moving on to matters which may require further consultation, the TCA is strongly of the view that to the extent possible there should be consistency between jurisdictions in relation to powers of attorney. We support the redrafting of the forms, noting the need for simplicity in the forms on the one hand so as not to deter people from using them but ensuring that there is adequate flexibility within the forms and that adequate information is provided to donors and witnesses to ensure that the forms are executed properly.

We do not present a template for what is necessarily a good model, but we draw the committee's attention to the fairly recent UK adoption of lasting powers of attorney and their forms. We are not sure whether the committee has had that drawn to its attention — it may or may not have — but there may be approaches in that documentation which the committee is interested in, and we will provide a copy of that.

The TCA supports the availability of consolidated forms that include health guardianship and financial powers into the one document rather than requiring separate documents for those.

In relation to auditing of accounts of attorneys, the TCA is not opposed to that, save that the TCA would be opposed to a prescribed form of accounts, mostly because its members currently have invested significantly in computer software which generates accounts and if a prescribed form was used, there might be considerable

expense involved in altering that software. The TCA would, however, support prescriptions in relation to the required content for financial statements, for example, asset balances at the beginning and end of the period and any credits or expense transactions incurred during the period. What we would be wary of is an actual prescribed form rather than prescribed content.

There has been discussion in relation to the pros and cons of a registration body for powers of attorney. We note that the benefits of a central register include enabling those with a legitimate need to determine whether a particular power of attorney is in force for someone who may have lost capacity. It provides protection for individuals who have made proper arrangements while they have capacity to ensure that when they lose capacity those arrangements will continue in force. Obviously when people progress towards losing capacity their personal affairs can become quite chaotic. They may have made appropriate arrangements but those documents can quite readily be lost in the course of their decline. It means that where capacity is lost and that is identified, the identity of any attorneys appointed can be quickly and accurately identified, enabling a smooth transition in the administration of that person's affairs. It also means that in the event of major disasters like the bushfires there is simplicity in re-establishing the affairs of affected individuals. And, importantly, a central register would provide warnings where someone may seek to register a later enduring power of attorney which is prepared when the donor's capacity is in doubt. Obviously a major concern in relation to powers of attorney is where people lose capacity and people seek to take financial advantage of them. At present the holder of an existing power of attorney is not notified or aware in the event that their power of attorney is purported to be revoked. If there was a register, that would enable a mechanism by which there would be a flagging of the revocation of power of attorney, and if there were concerns about capacity at that time, they could then be ventilated in the appropriate forums.

With respect to the question of whether the registration should be voluntary or compulsory, if it is voluntary, there is a potential for a low uptake, which would risk the system itself because there may be a doubt about whether any reliance could be placed on the fact of registration. If it is compulsory, the question of confidentiality comes into play — whether people will be concerned about registration and people being aware of how they are organising their personal affairs. There would also be the question to address about whether a failure to register a document would invalidate any transactions that were purported to be exercised under it.

As far as the privacy issues go, the extent of those issues depends on who would have access to any compulsory register. There would be potential, for example, for a narrow band of access, which might be confined to VCAT, the Office of the Public Advocate, the donor and the appointed attorney, any registered medical practitioner and authorised officers of registered trustee companies, to obtain information about the currency of powers and certified copies. In other words, there would not be general availability of access to the register. A broader range of access would involve financial institutions, for example, being able to contact the register to ascertain the currency of a power of attorney. We believe that it is more in relation to that sort of access that the privacy concerns would emerge because, clearly, just about anyone would be able to obtain a copy of a power of attorney if that was possible because just about anyone would have — —

The CHAIR — Could I interrupt you there, Lachlan? We are halfway through our time and I am anxious that people have the opportunity to ask some questions.

Mr WRAITH — I will move on; I am nearly finished. There are ways that those privacy issues may well be able to be addressed so that there are not concerns about gratuitous public access and full utilisation of the register can be implemented.

There is an issue which has not been addressed in any of the submissions and probably falls into the ambit of personal rather than Trustee Corporations Association views, and that surrounds the problem of detection in relation to loss of capacity and what is done when organisations or individuals have concerns about loss of capacity. One of the difficulties here is that there is perhaps a much lower reporting of incidents of financial abuse of the elderly than of other forms of crime because where the abuse is successfully orchestrated there is no way of detection. Presumably, or typically, someone who gets a power of attorney will also get themselves appointed as executor of the will and there is no-one who is able to determine what has happened.

One of the problems is, in my view, that as the system currently operates any individual or organisation concerned about someone's capacity has to commence proceedings in VCAT in order for there to be any investigation in relation to an individual's capacity. I note that that reverses the process that is adopted in almost

any other area of the law whereby there is a body charged with investigation when issues are raised before there is a court proceeding commenced, whether you are talking about child protection or criminal justice or even animal welfare and so on. Where people have concerns in relation to issues they are able to report those to a responsible body that then makes an assessment of the nature of the allegation and what support is provided for it and then determines whether an investigation is necessary. If the investigation gives rise to a need, then a court proceeding is commenced.

Anecdotally, there are situations where medical practitioners, people in financial services — and even we as a trustee company — have had concerns about an individual's capacity, but not wanting to jeopardise the relationship that exists with that person, there is a reluctance to commence VCAT proceedings in the belief that doing so will cause the person to hold resentment towards the person who has commenced the proceedings and cause a breakdown in what might be the only supportive relationship that person has. If there was the ability for, perhaps, the Office of the Public Advocate or some other statutory body to have a power of investigation which would enable a determination of a threshold level of capacity before there is the intervention of a court-like procedure such as VCAT, it is submitted that it would vastly increase the detection of incidents of loss of capacity in the community and substantially reduce the opportunity for financial or elder abuse. That would obviously be a very costly exercise to set up, but we do not believe the cost would be disproportionate to the benefit to the community.

The CHAIR — We do not have a lot of information about the community's take-up of powers of attorney, and I know from what you have been saying that you probably would not be keeping a lot of data, but what is your sense of the take-up from your experience? I think you have several thousand powers of attorney which you are managing.

Mr WRAITH — As an industry body.

The CHAIR — Yes.

Mr WRAITH — Our problem is that our sample space self-selects. People who are our clients tend to be literate; they tend to be from Anglo backgrounds; they tend towards financial sophistication, recognising the need for a trustee company in their affairs. Almost by virtue of the fact that they are dealing with us they are sensitive to the need for proper financial planning, so we are really not in a position to — —

The CHAIR — Do they tend to do it before there is a crisis?

Mr WRAITH — Yes, but then by virtue of them being our clients they are guided to do that. The uptake amongst our clientele is high, but we suspect that that would not be an accurate reflection of society.

The CHAIR — That is fair enough.

Mr CLARK — A quick follow on from that and then another factual question. State Trustees said they wrote about 20 financial powers for every one guardianship power, and even less Medical Treatment Act powers. Do you have a similar experience amongst your members or your firms individually?

Ms HAUSLER — I could probably answer that on behalf of Trust Company. I would estimate that it is probably closer to 30 financial powers of attorney for one appointment of enduring guardian. There is a far greater uptake of financial powers of attorney.

Mr CLARK — And I take it even less Medical Treatment Act powers. Is that a fair statement, or do you not get involved with them at all?

Ms HAUSLER — We do not accept appointments as medical attorneys or guardians only as financial attorneys, but the uptake of medicals would be around the same as the appointment of enduring guardians.

Mr CLARK — My other factual question is about the fee structures that apply to trustee companies when you act under a power of attorney on a commercial basis. Is there a statutory fee scale? If so, can you point us to it? If there is not a statutory fee scale, what is the normal charging basis you have for your clients?

Mr WRAITH — Section 21 of the Trustee Companies Act proscribes maximum fees that can be charged in respect of any appointment of a trustee company which includes appointments under powers of attorney.

However, we certainly do not — and I think it is probably common — apply that fee scale to appointments under powers of attorney where we are involved in the appointment. We have a progressive fee scale, which we call our total care fee scale, in which we charge an annual asset-based fee. It starts at 1.925 per cent per annum for the first \$200 000 of a person's portfolio. It then drops down to 1.375 per cent. I have looked at the fees; I could be wrong about the margins — up to \$500 000 and it then drops down to 0.99 per cent above \$500 000. I think they are the margins.

The statutory limits distinguish between a capital commission and an income commission, which is really more appropriate in relation to estate administration than to an ongoing appointment like a power of attorney appointment. Having said all of that, you may or may not be aware that the regulation of trustee companies is about to come under the sphere of the Commonwealth, and the draft legislation which is presently before the Senate will see the removal of the statutory caps in relation to any form of fees. It will simply require the publication of applicable scales on the internet, and thereafter there will be no proscription in relation to fees.

Mr BROOKS — Some of the evidence we have received supports reporting and auditing requirements for people acting as attorneys. Do you have a view on that? Do you support regular auditing — maybe yearly?

Mr WRAITH — Presently under the Guardianship and Administration Act — appointments by VCAT — there is a requirement for annual reporting of accounts. It is difficult to see why there should be a distinction between someone acting under a power of attorney for someone who has lost capacity and an appointment by VCAT. In both instances it is an individual acting in a fiduciary capacity for someone who is unable to scrutinise the activities of the person who is acting on their behalf. There does not appear to be any reason why the reporting requirements would be any different.

Auditing is a different thing from reporting, of course, and that would impose a very significant expense. But if there was a reporting requirement with auditing on a discretionary basis — or random or whatever — it might be an appropriate compromise.

Mrs VICTORIA — You spoke about medical doctors perhaps being authorised witnesses, which is currently not the case — —

Mr WRAITH — I think it is currently. Presently anyone authorised to take a statutory declaration is authorised to be an authorised witness of an enduring power of attorney. On that basis a medical practitioner would be. But if you upscaled to the standard of someone who is entitled to witness an affidavit, you would then take medical practitioners out of the scope. The suggestion was really that if you were going to elevate it to the requirement of people — —

Mrs VICTORIA — But if we were to that, do you see there would be a problem, or potentially a problem, when you have a person in a life-or-death situation who just says, 'This is the nearest person. I will have them as my attorney in this case. Doctor, sign here.'?

Mr WRAITH — That is probably how it would happen in many instances. An unexpected event occurs in their life and they find themselves in hospital potentially about to undergo an operation as a result of which their future will be uncertain. Under those circumstances they want to make rapid arrangements to ensure their estate is administered appropriately afterwards. Obviously it is not ideal for people to be engaging in financial planning decisions in that situation, but it is perhaps preferable that they have the option to do that rather than for there to be no facility for them to make plans which means the default position applies and everyone is off to VCAT afterwards to have an administrator appointed.

The CHAIR — Currently how do you make assessments regarding whether a person has lost capacity?

Ms HAUSLER — Is that at the point of making the document or at the point of invoking the power?

The CHAIR — A combination of both.

Ms HAUSLER — When we are drafting the documents the requirement is that the person understands the meaning and effect of the documents. It is a common-law approach. I suppose that as a solicitor it is one of those gut feelings you develop. The question I ask the client is: 'What do you understand the document to

mean?'. If I am satisfied they understand what they are signing, then at that point I am happy to witness the document and to sign the declaration or the certificate saying that.

The CHAIR — That is the only question you ask?

Ms HAUSLER — No. We have a checklist which the legal practitioners liability committee has produced that we go through when we are seeing a client. There are a number of questions which we retain with the file. However, I note the UK powers of attorney document encompasses a list of the points the witnesses must be satisfied about as to the competency of the donor, so it is a far more detailed certificate compared to what we have here.

The CHAIR — What is your view of that? Is that a direction that might be useful for us to go down, or are you happy with what we do at the moment?

Ms HAUSLER — My personal view is that there should be something more detailed in the current form because solicitors who are practising who do not ordinarily practice in that area of law and who are witnessing these types of documents are not aware or not conversant with the types of questions they need to be asking to satisfy themselves that the person has capacity.

The CHAIR — Around activation?

Ms HAUSLER — Yes? Do you want to talk about that?

Mr WRAITH — I can. It is very much a case-by-case situation in relation to activation. Often activation will be very simple to ascertain because a family member will contact the company and say, 'Look, Mum or Dad is in this situation', and it will be clear and unambiguous. Where there is ambiguity in relation to capacity the first port of call would usually be the individual's general practitioner, if they have had a longstanding relationship with the general practitioner and if that remains applicable. In very difficult cases it may be necessary to seek a neuropsychological examination of the individual to make an assessment of their capacity. But it really is a case-by-case thing.

The CHAIR — But you would always seek medical advice?

Mr WRAITH — If there is no question about the fact of the loss of capacity, then not necessarily. If all the family members are clear that mum or dad need the company to act because they have lost capacity — and they might be in high care for example — it may not be necessary to do that. It is only if there is a potential question in relation to that, which often there is because family members are in disagreement, so you go to get confirmation or cooperation to ensure you are on strong ground.

Mr DONNELLAN — Even GPs find it hard sometimes. I am dealing with somebody at the moment who has Parkinson's disease and the GPs are reluctant to say with absolute certainty one way or the other whether this person has any capacity. Obviously they have some capacity, but the level of capacity, so they are going for those neuro — —

Mr WRAITH — And it is by no means foolproof. There is a recently reported decision of the Supreme Court in a case relating to Brown and Sandhurst Trustees where Sandhurst Trustees prepared a will for an individual having first got a certificate from a doctor that they had capacity. Subsequently the court found that due to matters unknown to the doctor at the time in fact the testator did not have capacity. In that instance the testator had paranoid delusional beliefs concerning family members and changed their will accordingly. That was not apparent from presentation. There is no easy answer. It really does feed into what I said at the closing of my opening comments in relation to the benefits of having an independent body charged with investigation in any instance where there is any question in relation to capacity.

Mr CLARK — Do you find in practice that there are many instances where there is a conflict between the holder of a financial power and the holder of a lifestyle power? For example, the lifestyle power-holder wants to put the principal into a nursing home, but the financial holder does not want to realise the assets necessary to pay for that. If that is a problem of delineation, do you have any views as to how the law could be changed to resolve those conflicts?

Ms HAUSLER — Personally I have not seen any of those issues, but I can see that it could arise. Have you seen anything?

Mr WRAITH — No. Wherever that sort of issue has arisen we have been able to resolve it by negotiation with the guardian. Presumably under the current process — I cannot think exactly what the section would be — you would go to VCAT. If you were confronted with that situation as a matter of practice, you would go to VCAT for a resolution of the impasse.

Mr CLARK — You think that is satisfactory?

Mr WRAITH — It probably is. I mean, the alternative would be to give one particular holder a power of veto over the other, but then it may well just provoke a VCAT application in any event if it were exercised.

Mr BROOKS — Just a quick one to get your view on some suggestions we had this morning. One was that if there is a registration scheme, there be an ability for people to nominate interested parties — other trusted persons of the donor or principal. The other take on that was, I think, mentioned in terms of the Japanese system where they have got one independent person to basically verify or keep an eye on things. How would you see that working?

Mr WRAITH — The UK system, which I have to confess I only became aware of yesterday, contemplates between one and five interested parties being nominated by the donor. On the face of it, it seems like a good check and balance for a donor to have in place to ensure that there is some further interested person who will ensure that their rights are not being limited by the invocation of the power of attorney in appropriate circumstances.

Ms HAUSLER — I will just reply to your question. You asked about financial attorneys and guardians and the conflict. With medical decisions, if you have a medical power of attorney and a guardian, the legislation provides that the medical power of attorney can override the decision of the guardian. That might be a way of getting around those issues, if that could be addressed in any —

Mr CLARK — That deals with that dichotomy. This question is should you have a similar overriding in relation to conflict between financial and lifestyle.

Ms HAUSLER — Yes.

Mr WRAITH — I think the difficulties with giving one a trump card over the other would be that, typically, it is going to arise where a nursing home is being contemplated and the accommodation bond is the financial issue. There may be a well-meaning family member who is not particularly conversant financially and is going to overly deplete the resources of the family member by insisting they go into a particular place. If you give the financial person that power to determine, we are really depriving the donor's choice of who should have input into where they live. It is a balancing exercise, obviously. If you find that sort of conflict it probably does require, I would have thought, some sort of independent determination.

The CHAIR — All right. We are over time. I thank Claire Hausler and Lachlan Wraith. Thank you very much for coming. It has been very much appreciated. Thank you again for your submission. As I indicated earlier, you will get a copy of the Hansard transcript and you can make some slight changes to that but, obviously, substantively it will be the way it is.

Mr WRAITH — Claire has a copy of the UK forms.

The CHAIR — Yes, please. Thank you.

Witnesses withdrew.