

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 17 December 2009

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Mr I. Gilbert, Director, Retail Policy, and

Ms D. Tate, Director, Financial Services, Corporations, Community Policy, Australian Bankers Association.

The CHAIR — I welcome Ian Gilbert and Diane Tate from the Australian Bankers Association. Kerryn tells me you have come down from Sydney.

Mr GILBERT — Yes, I have, but I am an expat Melburnian, I just happen to have been in Sydney for a few years.

The CHAIR — Thank you for your submission, which is appreciated. As you would have heard me say to previous witnesses, we are making a transcript of our conversation and you will be provided with a copy of it to which you can make minor changes. These proceedings operate under parliamentary privilege and other legislation which affords you protection against any action that someone may wish to take against you for remarks you make, but obviously that protection does not extend beyond the confines of the hearing. We have just under 30 minutes, so I will leave it to you to speak to parts of your submission or to the terms of reference. Then we have prepared some discussion starters.

Mr GILBERT — Very good, thank you. Perhaps I will make some very short opening remarks, because I do not want to take up a lot of the Committee's time. Obviously the Committee is looking into this very thoroughly. Suffice to say that from a banking perspective we are like any other member of the community, having to rely upon the legitimacy of a power of attorney. Of course, a bank can only act on the mandate of its customer, and so therefore a power of attorney needs to be effective for the bank to honour it and to allow the donee to operate. There are also privacy implications under privacy law. A bank is not able to disclose details of its customer's account to a person unless the customer authorises that. These are two dimensions for us as a user — as an observer, as it were — to this power of attorney process.

I have looked at some of the submissions on the website, and it is very clear from most of the input that is coming to this Committee that the formation stage of the power of attorney is absolutely critical both in terms of authority and capacity. We support many of the comments that were made about the formation stage and the potential for a registration system to be established. We think that would be a valuable addition to the authenticity of the particular instrument.

We also support other submitters who have called for simplification and for standardisation particularly on the national application. Financial services are borderless in this country and probably outside this country. Also, there is a need for a good education campaign about the decision to grant a power of attorney, the sorts of benefits that inure from that and also the risks — the downsides — and the care that needs to be taken in selecting the donee and undertaking that step. That is just a very brief outline of where we see the issues. Thank you.

The CHAIR — Diane, would you like to add to that?

Ms TATE — I am fine.

The CHAIR — In your submission you talk about the informal arrangements that people make, and I think you gave an example of a person having a pin number. They look after their affairs in an informal way. How prevalent do you think that is, and tell us a bit about the dangers in that. Obviously most people judge that to be a perfectly sensible thing to do.

Mr GILBERT — Our members would caution people against doing that sort of thing. There is an electronic funds transfer code of conduct which is administered by the Australian Securities and Investments Commission. All authorised deposit taking institutions — banks, building societies, credit unions — are subscribers to that EFT code. There are also some other financial institutions who keep accounts for customers that are also parties to that code. One of the provisions in that code is that if you voluntarily disclose your access code, or PIN, to anybody and there is an unauthorised transaction, then you are liable. That has been a policy decision taken by ASIC which developed the code.

We do not advocate people doing those sorts of things. We would rather see more formality in relation to the agency relationship. I heard one of your earlier witnesses mention that with formality there seems less risk of things going wrong later on than where there is some informal arrangement. If that had to happen it would be far better that that authorisation occurred under some formal arrangement with perhaps some additional protections around it at the formation stage.

Ms TATE — I would add to that that in addition to the concerns that banks have from the consumer protection side of things, it is also worth noting that a bank relationship is a contractual arrangement and therefore there are concerns from banks where informal arrangements, which are legally ambiguous at best, and which can leave consumers vulnerable to exploitation or financial abuse. It also leaves them vulnerable to the legal ambiguities of their contract. In fact, they may have breached their contract with their bank by giving up their access codes to others to use. I think there is both the consumer protection side of this equation as to why we are concerned, but also the contractual side as well. I think banks need to have clarity as to their liabilities, and consumers need clarity as to what their liabilities and their protections are.

The CHAIR — How prevalent do you think it is?

Ms TATE — It would only be anecdotal.

The CHAIR — Just your hunch?

Ms TATE — The feedback from banks, but mostly from the public advocate who we have been working with in Victoria and other states, is that they think these arrangements are more prevalent than we would like to accept. I guess one of the things I would say with some degree of sensitivity is that I would observe that the tribunals themselves are sometimes reluctant to put in place formal arrangements and are actually encouraging informal arrangements.

We have had feedback from our banks saying they have had customers coming forward with instructions from the tribunal to say, ‘These informal arrangements should be okay’. Obviously, they are not okay, and I think we need to make sure our tribunals are adequately resourced to be able to deal with an increasing need.

From the observations of bank feedback, and it is only anecdotal and in terms of prevalence from what we hear from the community sector, we think there are a number of reasons why people like informal arrangements. Certainly, the human nature side is that, ‘I keep a degree of autonomy’ but I think there are some real legal risks around informal arrangements.

The CHAIR — You are saying that if a person has an elderly parent, it is better for them to enact a power of attorney arrangement and then they could legally carry out the transactions and have access to the pin number and all the rest of it. That is the best way of doing it. In fact it does not harm any personal relationship, but it sets it in a legal framework.

Ms TATE — Yes.

Mr CLARK — Most of the evidence we have taken so far is related to what you might call the community use of powers of attorney, but they obviously of course also play an important role in commercial transactions. Your submission mentions four types of powers of attorney in Victoria. Those would be the specific statutorily recognised ones, but there are also common-law ones, which are alluded to in the legislation. I want to ask you in particular about the general power of attorney and about the uses of common-law powers of attorney for specific transactions. Could you tell the Committee a bit about how those are used by banks? In particular, would you care to respond to the recommendation we have received in some submissions that the general power of attorney ought to be abolished?

Mr GILBERT — I can only speak from a bank perspective. The more certain the powers that are conferred, the better. The statutory forms of the general power of attorney are a bit wide, and I accept there would be some concerns with that. Certainly in terms of dealing with a financial institution it removes any element of doubt, assuming that it is properly formed and the person had capacity at the time it was formed and retains that capacity. It is certainly a clearer and more effective means of recognition by a financial institution of the authority to deal with the person, whereas the old common-law powers of attorney went on at some length for some pages.

With a person in a branch — even going to a manager in the branch — to be authorised to deal in the matter, there would be bound to be a delay in its referral to lawyers before it could be undertaken. For the true case of an authentic power of attorney, the customer’s interests are best served with simplicity and clarity as far as the financial institution is concerned.

Mr FOLEY — In regard to the focus of education that your submission talks about, there are two elements to that. You talk about an information package for banks. I was wondering if you or any of your members have turned your minds to what that might look like and if there is anything out there. If not, how would you go about developing it, or will you? I suppose the other one is more broadly about the community and from the bank industry's perspective the sort of education campaign on preparing and executing such documents that would be available for those people who have powers of attorney, and what you would see as having an emphasis in that campaign.

Mr GILBERT — Do you want to speak to that, Diane?

Ms TATE — In terms of education, obviously the three things that we said we needed were simplicity, standardisation and education. We think education is vital to go along with any prominence of use of powers of attorney. If I can start at the top level, we would be strongly supportive of a national campaign and an education campaign around the uses of powers of attorney and promoting the responsible uses of those instruments.

Flowing on from that, you talked about two types of education that could occur: one with banks and their bank staff and customers, and one I would call or classify as community education. In terms of the community education, I think some other witnesses have also commented on the importance of clear information around the selection, choosing and appointment of attorneys, how to prepare an instrument and what the duties and obligations are of all parties involved, including witnesses, solicitors and medical practitioners, ensuring that people understand the limitations of instruments.

Often banks are dealing with instruments that do have limitations, and these can obstruct streamlined transactions. Part of a transaction may be okay to do and another part may not, so that would slow up the process. If they are putting limitations in place, people need to understand what those really mean in practice, and in terms of also revoking instruments. Of course we support registration, so we think revocation would be part of people being able to lodge their instruments and take those powers away and replace them as needed. Banks specifically are most interested in that.

In terms of bank education, quite frankly we have struggled over the last couple of years to put together some information for our member banks. We have been in consultation for some time. One of the difficulties is around the differences of the instruments across the states. It is very difficult for us to provide some clear guidance that can be translated across the jurisdictions.

It is very difficult for us to put together a package of information about addressing customers' needs with third party arrangements, we are still working on that. So there is some work that we have been doing with our members, and we hope to have some of that finalised next year.

Some of the other things and challenges we are dealing with are observing, identifying and knowing how to respond to potential instances of financial abuse. Of course it is a very sensitive issue if you are to observe and intervene into a quite legitimate transaction where there is not clear legal authority to do so. There are some pretty challenging legal issues we are grappling with, but I think that giving bank staff information on how to appropriately respond and what to do is very important.

Mr BROOKS — Following on that point, in terms of identifying the potential abuse and instances of abuse where there might be concerns about the way people are behaving — an example might be someone who claims to have a power of attorney utilising someone else's account — is the ABA producing guidelines for bank staff in terms of how to identify that and what are the triggers to ask further questions and so on?

Ms TATE — In terms of the information for banks, as I said, it is a very challenging area. There is some information that we have been working on for some time, and also the former Banking and Financial Services Ombudsman put together some information about recognising some observable signs. This can be helpful and can be useful.

Again, I think it is a very difficult thing to put a bank teller into a position of intervening in a circumstance where often, if there is a suspected case, it is probably a breach of trust — a family member or a carer or similar. These are sensitive issues, so I think we need to be very mindful of what can be legally done and what can be operationally done. Certainly these are some of the things that we are looking at.

Mr GILBERT — Perhaps one of the most important things is what I said in my opening statement about getting the formation right. If it is authentic right at the start of this exercise, then there is a greater prospect that it will be a successful exercise for the person who is seen to have the affairs conducted by the agent. Yes, there can always be people who abuse positions of trust. We could make laws to prohibit that, but we would never prevent it. Making sure the formation is right is certainly a flying to start to having what should be a relatively trouble-free process afterwards.

The CHAIR — On the question of capacity that we touched on a bit before, much earlier on in our inquiry Kerry and I were involved in a conversation with somebody who put it to us — and you would have heard the people from Victoria Legal Aid — that capacity is contextual, so it is an unfolding process where people are capable in some areas and not others. It was put to us that that is fine in the stream of life, but when it comes to banking either you are competent to sign for a withdrawal or you are not.

If that is true, my first question is: how do you then think about the issue of a person being able to make a withdrawal, but they might not be able to walk into the bank to take out a loan to buy an apartment or sell it? How do you process that?

Mr GILBERT — It is problematic. I think both the legal profession and the medical profession have difficulty with this whole concept of capacity. To enshrine a concept of capacity into the law is quite a difficult thing. The law can tell you in a factual situation whether someone has legal capacity or not — whether they are sui juris, as the lawyers would say — but it is going to be determined on independent instances and on a lot of medical advice.

Having read some submissions and so forth, I have been giving some thought to this, and I think the medical profession is obviously a very relevant factor in all of this in terms of certifying whether a person is or is not of sufficient capacity. The possibility is that medical certificates are for people who may have some impaired capacity but who are not fully impaired. Perhaps it could be useful to allow things to continue perhaps in a limited way, rather than end the relationship so the person is forced to go to a trustee or guardianship arrangement.

The CHAIR — So it would be possible for a bank to consider a person who perhaps is in a relatively early stage of Alzheimer's or some degenerative disease and say they can come in and make withdrawals up to this value — —

Mr GILBERT — If the capacity had been questioned, and it was apparent to the bank that there was a problem with capacity, a medical certificate may help to ease the concern that the bank has about whether in fact it is acting within its mandate in dealing with the agent, the attorney, through a customer.

The CHAIR — To present it a bit clearer, let us take an older person who is more likely to have their passbook and who likes to talk to the teller over the counter. The teller might be briefed and have something activated that says this particular person can only withdraw money up to \$200 or \$400. Are you talking about that? If it was at an ATM outside, and if it was over that amount, could there be a blocker on that? Are you talking about those sorts of things?

Mr GILBERT — No. In a system sense it would be virtually impossible to do. Given the relatively few instances — banks have millions of customers and only a very small section of the customer base may be in that situation — the cost would substantially outweigh the benefit. Systems-wise, no, but perhaps just on a written authority or something like that, that could be done on a face-to-face type thing.

The CHAIR — What does that mean, 'on a written authority'?

Mr GILBERT — If a medical practitioner was to say, 'I think that this person is still sufficiently capable of transacting, or the attorney is capable of transacting, up to X amount of dollars', that could be done, but it would be far better to get a clear, concluded view on capacity and have a clear dividing line on when the power is extant and when it cannot be operated on.

Ms TATE — I will just flesh out what Ian is saying and perhaps extrapolate where your question is coming from, which is to ask whether it is possible to set up different processes for the same customer in terms of dealing with different types of transactions. The short answer to that is it would be extremely difficult

administratively to ensure that those sorts of arrangements would actually be effected. However, what could be done from a systems perspective is that, for example, you could request to reduce your maximum daily withdrawal limit, which may mean you can only withdraw \$200 over the counter or from the ATM — and this is actually not a question of capacity but a question of a customer requesting to have certain limitations placed on their account. That could be applied to the account, but that is just a product answer to a question about how to manage money. It has nothing to do with determining capacity.

I think the important point is that from a bank's perspective, in dealing with instruments or with customers, the bank should have clarity as to how they are able to transact with their customer. The question of capacity is actually at the stage of the formation and execution of the instrument, not in the use of it.

Mr CLARK — I want to come back to the issue of registration. I want to ask you whether you think there are any forms of powers of attorney that you do not think should come under a registration scheme. I want to illustrate that many mortgage documents will include a power of attorney given by the mortgagor to the mortgagee to enable execution of the security and to transfer the security, if needed. There are also many multimillion-dollar commercial transactions, mergers and acquisitions, corporate purchases and sales in which a power of attorney to execute documents is an integral part of the package that is prepared. Do you think those sorts of powers of attorney should also be required to be registered for validity; and if not, where would you draw the line between what had to be registered and what did not?

Mr GILBERT — I think clearly in commercial transactions there would be an assumption that we were not dealing with a familial and consumer-type scenario. I think that is probably a fairly clear distinction. In terms of the powers of attorney that are contained in mortgage documents, the mortgages, or the general terms and conditions of the mortgage, are required to be lodged with each of the state and territory land titles registries; they are already registered and there would be no need to go beyond that.

Mr CLARK — That is for mortgages of land. I am thinking that mortgages of shares perhaps would not be registered.

Mr GILBERT — No, but I think if the power of attorney that you would find in a security document is to effectuate completion of the transaction itself; there may be some other incomplete part of the transaction. It is a bilateral relationship. It is not broader across the community; I want to make that clear; and that has to be exercised within the terms of the document — the completion.

There are some powers of attorney that are granted to a mortgagee on default, where the mortgagee is able to effectuate a realisation of the security, and there is sufficient body of statute law and common law to determine how those powers should be exercised in terms of the contract with the customer. Therefore I would certainly draw the line at having those types of arrangements registered.

These are basically what I would describe as very simple situations where someone needs personal affairs dealt with because they are either unable to do so or, for convenience sake such as being overseas, they need that assistance through a power of attorney, or perhaps they apprehend a time when they will not be able to make those decisions themselves and they want to authorise someone to do that.

Mr CLARK — So in effect you are saying there is a line that needs to be drawn and probably this Committee would need to work out where to draw it?

Mr GILBERT — Yes. I do not have any statutory precedent but I am sure there is one somewhere.

Ms TATE — A commonsense answer, again as an operational observation, would be that if it is an instrument that is able to be used more broadly and not transaction executionally specific, then that is something that would be helpful for businesses, including banks, to be able to verify and validate that it is current, that it has been executed correctly, and if there are certain limitations around the use of that instrument.

Mr GILBERT — Yes, and I can give you an example: Within a bank there are delegations of people who are given power to sign documents via powers of attorney within the bank, and this is to executives or junior officers down the line. So those delegations obviously stay within the bank, and there is no need for registration in those instances either, so I think there is a class which moves this out of the personal realm which you would not need to register.

Mr FOLEY — If I could mention this, Chair, some issues are set out in legislation, and there is a national organisation — probably you could have a look at the Queensland legislation in that respect — which seeks to set out the powers of attorneys and other jurisdictions as well. New South Wales is one that is regularly referred to in the submission as well.

Having had a look at that, what power do you think attorneys and guardians should have in legislation? Queensland is often held as a model by some people, but do you think that that sets out sufficient clarity for what the powers of attorney should be?

Mr GILBERT — I have not looked at the Queensland legislation, but generally speaking the powers that are conferred should be primarily based on the document that is conferring the power. If it is a general power of attorney, it is to do everything that I may lawfully do. Because it is a position of trust — an agency relationship is generally a fiduciary relationship — there is a whole body of law that sits around that relationship in terms of conflicts of interest, personal gain, acting in good faith and so forth.

I am not sure what powers the Queensland legislation is suggesting, but I assume it includes powers to sign, powers to make decisions about certain things, which would generally go with the document that is conferring the powers. The question is to what extent the Queensland powers limit the exercise of powers that I, as a donor of the authority, can only do myself, that my attorney cannot do? Notwithstanding that I have said my attorney has power to do everything that I can lawfully do.

Those are the sorts of things that would start to add some complication from our members' perspectives in terms of what may or may not be done in a particular instance. That is quite a technically difficult, staff training exercise for financial institutions to undertake.

Ms TATE — I have looked at the Queensland statute and also the New South Wales one and in terms of Queensland, where it is quite explicit about the particular powers — and that is contained in statute — that is attractive for business because there is certainty as to what is provided statutorily and legally.

I do not think that means that there should not be interpretive guidance provided as well, because statute cannot provide all the information that may need to be understood about the use of those instruments.

I think the other point I would make is that we also made some comments in our submission about simplification and consistency of terminologies across forms, and ensuring that instruments 'look and feel' the same. For bank staff who have to try and recognise different instruments and interpret what that might mean, it is administratively complex and an operational hassle, and to remove that and provide certainty we think would be a helpful thing.

In Victoria the process at the moment is, I understand, that you cross things off rather than opting in and ticking things in. So instead of opting out we would say you should opt in. It focuses people's minds on what powers are actually in place and what authority that attorney actually has.

Mr GILBERT — I think the point we were making earlier about the formation process is critical because if a person's mind is being focused on formality, including about who they will appoint and what they will appoint them to do, the conscious decision to tick the box to include a power is part of the integrity of that formation process, and that would again probably, more likely than not, end up as a successful exercise for the person concerned.

Ms TATE — An example of how it can be explicit in statute; but you still need to have guidance or interpretation around that; could be in relation to a transaction to effect a property exchange, and the attorney has the ability to make decisions around property but cannot actually finish the transaction because they may have explicit restrictions around some financial exchange access. Banks have encountered those problems where again it has held up the process. They have had to go in and really interrogate what the attorney is able to do.

We think the intention was to complete a transaction in property, but the way the instrument was struck in the first place placed some question marks around it. So bringing people's minds up front in the process of putting in place a power of attorney and what you are allowing your attorney to do is very important.

The CHAIR — We are out of time but I have just one quick question. You talk in your submission about setting in place standard processes for validating powers of attorney. Are banks picking that up? Is that becoming more widespread? Or are there already processes in place?

Ms TATE — Again, at the moment because of the variances of instruments and authorities across states the answer as to how a bank will validate will be quite different; so how a bank has to go about validating an attorney in Victoria is quite different to other states.

The CHAIR — I understand that.

Ms TATE — So the short answer is identification, checking where it is registered. If it is not registered, ensuring that there are statutory declarations. If you do not need that, then internal processes are needed to ensure checking of signatures, making sure those sorts of things match up.

The CHAIR — Thank you both very much, Diane Tate and Ian Gilbert. You will be provided with a copy of the transcript to which you can make minor editorial changes, and I hope you will be open to our staff giving you a call if we need any matters clarified.

Witnesses withdrew.