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LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 30 March 2010

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Mr A. Cohen.

The CHAIR — Welcome, Adrian Cohen, to the public hearings of this Committee's Inquiry into Powers of Attorney. Thank you very much for coming along to talk to us this morning. You have seen the terms of reference of the Committee. I have a few preliminaries to go through first.

All evidence given at this hearing is protected by parliamentary privilege as provided under the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act and, where applicable, provisions of reciprocal legislation of the Australian state and territories. Any comments you make at this hearing are protected by parliamentary privilege; but if you make comments outside, you will not be protected by that privilege.

The proceedings will be recorded by Hansard. You will be sent a transcript afterwards, and you can make any minor changes that you wish to make at that point. We have half an hour. We will give you some time, and we have some questions to ask you then.

Mr COHEN — Thank you. I thought it would be best to explain my situation, say where I have used some powers of attorney and where I have not used them, and then talk about the education for myself — the decision-making process is roughly where I have been guided to speak.

I would like to say firstly that I hold financial and medical powers of attorney for my parents. I think they have worked very well. I have been able to manage their affairs more than adequately with these powers. I am totally responsible for both my parents' wellbeing. It is a 24/7 operation, and I have been doing it for about six years. Basically they have not been responsible for that period of time.

I am the only child of my parents. They have been married to each other for about 70 years. Dad's age is 97. He is aware and sensible, but he is legally blind and has limited memory and mobility. I think he probably has capacity. Mum is 93, unaware, not sensible, bed-ridden, legally blind and asleep most of the time. As I said, I hold both their medical and financial powers of attorney. Mine are older-style documents, not the new ones. The financial ones were made in 2001, and the medical ones were made in 2004.

The way the system seems to work is that they generally give a person the power of attorney once and then they use them multiple times. For a bank you get a banking authority once you have presented the power of attorney. You present the power of attorney, get the banking authority, and they never need to see the power of attorney again. In Father's case, I have used his power of attorney 66 times, and I have used Mum's about 56 times. They are the financial ones. The medical ones do not have a requirement, as far as I am aware, to keep extensive records, but I do keep records of what I do. It is very hard to know when you are making a medical decision with a power of attorney or just a medical decision as a child.

The financial ones I think I would use daily. For example, if I am paying an electricity bill for Dad's house, that is a use of his financial power of attorney. I pay it out of one of his bank accounts and I pay it on the internet. It is not my money; it is his money. That is really using a power of attorney.

Where else have I used the power of attorney for my parents? I have applied for Centrelink and Veterans Affairs pensions and I have used it for Medicare — I will come back to that — the Australian Taxation Office returns, the state government, VicRoads, the State Revenue Office, under the Unclaimed Moneys Act and for town planning matters, local government disabled parking permits and town planning permits. We had an attempted prosecution for one of Dad's activities that I had to sort out. Then in the financial situation: banking; employing professionals, doctors, lawyers, case managers; dealing with share registries for dividends, takeovers; paying bills like gas, electricity, rates, insurance policies, owners corporation meetings — doing levies for them and proxies; and sorting the nursing home accounts, the health insurance, the chemist bills, lease statements, disclosure statements on leases and club memberships. Then there is the medical situation where you get advice from GPs, dentists, hospital carers and nursing homes. We have a family case manager who helps me manage them.

I thought that, as voting was compulsory in this state, I would go along and use it for voting. I went along early and decided, after being advised by the Australian Electoral Commission, that I was not allowed to use them. I was very pleased because I do not think that is an appropriate use of a power of attorney. The same applies to council elections. We have had club membership elections where people have solicited votes from me for my parents and I have said, 'I am not allowed to do it at a state election so I am not doing it at a club election, so you can miss out'.

I do have difficulty occasionally in deciding which power of attorney I am using. I have a medical and a financial power. If I have to buy expensive medicine, for example — one of my parents is on something that is an expensive non-listed pharmaceutical, a doctor-prescribed medication for her dementia to stop her calling out — is it a medical decision or a financial decision to use the drug? I have not bothered with the situation, but if it were one or the other, I would not really know which one to apply or who should make the decision.

The other aspect concerns when you are dealing with Medicare. In the beginning I had difficulties with Medicare because it had a system whereby the powers of attorney dropped off their computer after 12 months so you had to do it all again. I started ringing up. I got to somebody in Canberra and I explained to them that I did not think it was their role to drop it off. Once they had been notified, it was my responsibility to notify them if I no longer had the power of attorney. They apparently listened because it is still on after several years. I think that is a pleasing thing. With Medicare the question is: which power do you give them; is it a medical situation or a financial situation? I had absolutely no idea so I thought I would send in both, and they explained to me that Medicare is only about money; it has nothing to do with a patient's health. But they got both just in case.

Educating me about powers of attorney — I am a lawyer, and I have a practising certificate, but that did not really help much. I do not really practise. I found the book *Take control*, which is by the Office of the Public Advocate in Victoria and Victoria Legal Aid, very helpful. There is a table on page 28 of the recent edition which is particularly useful. It is headed 'Summary of powers of attorney and guardianship'. It sets out what you can and cannot do. I think that is an excellent starting point for somebody who has absolutely no idea of what they are doing.

Finally, talking about decision making for my parents and how I go about doing it, I have known them all my life — surprise, surprise! — so it is a bit easier than if you were just put on the scene recently to deal with somebody. I think about what my parents would do in the particular situation, what they would have done and what they would have said they would have done. Then I think about my parents' best interests, about how they would like the situation solved, which is probably different from what they might say about how they would like it done. Then I normally go into a conservative position. If it is a multiple choice-type situation where you could go high risk or low risk, I would go for low risk. Normally, I would take a while to make the decision, because my idea about a decision-making process is you decide about a week out from the event and then in the last couple of days you actually make the decision so that you have time to change it or rethink it. I try to do it that way particularly with powers of attorney. Normally there are not many choices available. It is normally, if you think about it, a relatively black or white decision by the time you get down to the final crunch time. I just do my best honestly at the given time.

What got me to this Committee was after my wife detected a utilities man climbing over our beach house fence to check the gas meter, which he is perfectly entitled to do. I have no problems with that. If he wants a key, he is more than welcome to enter the property — and he is legally entitled to, as I understand it. He wanted to know, as we had not used the beach house for quite a while and had not used any gas and had paid only the meter charges, if I was stealing the gas or if there was something wrong with their gas equipment.

Of course when I ring the gas company to ask them, they will not talk to me because I am not on their list of people, so I have to send in the power of attorney. It is a bit strange. The beach house is in Mum's name, yet the account is in Dad's name, so which power of attorney do I send in that situation? It is a financial one. Do I send in Mum's or Dad's? Anyway, after talking to them I decided it was best if I faxed in the account-holder's name, which was Dad's. I did that, and it started me thinking. Then they talked to me about why they were there. They thought I was growing a massive marijuana crop, and I had a work around the meter. It is not a first, and they are perfectly entitled to have that view. When they heard what was going on, they were quite happy.

Then it started occurring to me that maybe we or somebody could put these powers of attorney on the internet in some way, shape or form. I do not really have any ideas other than to discuss how possibly to do it. My first thought was that as powers of attorney are prepared by lawyers maybe the lawyers could be involved. Maybe a person could pay a fee to have it registered — I would think something like \$20 — and then be given a password. The lawyer can identify the fact that they know the person who has given and received the powers separately. They could be lodged in a PDF file and then people who are in charge of accounts for things like the utilities or similarly minor transactions could go to that particular website, enter the passwords and who they are and then download a copy of the power of attorney and print it for their records. I see little difference between

the end result of that and me faxing in a power of attorney to a particular utility or organisation. I really was thinking of the internet as a transmission mode.

One of the other benefits of doing it that way would be that if somebody were to lose their paper document it would be a document that could be printed on the internet in some circumstances. That could be identified maybe by the person who prepared it and that kind of thing. Maybe the hospitals could have access to a medical one — for instance, in the middle of a Friday night, when the holders of powers of attorney are not around. I do not know how to do it, but I would like there to be a secure website.

The CHAIR — Thank you very much, Mr Cohen, for that presentation. We will go around the Committee but just to start off, you mentioned that the medical and the financial powers of attorney came into effect for your parents, one in 2001 and the other in 2004?

Mr COHEN — I think I have had a financial power of attorney for my father since about 1970-something. I found it the other day and have not really used that one.

The CHAIR — Could you just talk to us a bit about when and how that came into effect? Did it come into effect when each individual parent lost capacity, or how is it stepped through?

Mr COHEN — My father is a lawyer, and he has always had powers of attorney around the family for me, being the only child, to use. We have always had one for Mum and Dad. Mother went into a nursing home in about July 2004, and we signed the medical power of attorney in April.

The CHAIR — How is that related to their respective loss of capacity, and how is that assessed?

Mr COHEN — On their loss of capacity, I think Mother was quite capable of signing it when she did. The lawyer came out to our house, and one of my friends I went to law school with was there. All three of us assessed she had capacity. She walked into the room and looked at us stupidly and said words to the effect, ‘Why I am here? I want Adrian to look after me’. When I left the room while they talked to Mother about her views, she just kept repeating it and then simply walked out of the room — ‘Why are you wasting my time?’.

The CHAIR — We have heard evidence, and you would be aware, that loss of capacity is often contextual and circumstantial and a person can lose particular functions.

Mr COHEN — Every dementia is different.

The CHAIR — That is right. How did you negotiate and transact through it with your parents?

Mr COHEN — I did not have to. They basically were quite happy to sign up.

The CHAIR — So at a certain point you made all decisions in relation to their financial affairs?

Mr COHEN — I have been, yes.

The CHAIR — But you did that at a particular point. You decided from this day forward — —

Mr COHEN — No, not at all; Father is still capable. At 97, if you were to come and meet him today, he would be able to tell you, with limited memory, what he feels about things.

The CHAIR — So in making a particular decision with your father — taking that as an example — how do you on a one-on-one level work that through with him? Do you take some matters to him and with others do you decide independently from him? How do you work it out?

Mr COHEN — I was telling him in the last couple of days that I was coming to see you people. He said to tell them that I have done a great job looking after his affairs. I thought that was fabulous. He also said to me, ‘And by the way, I don’t know anything that you have done, but I am still here, and as long as there is enough money to pay the nursing home accounts and look after Mother and I, I am happy with what you are doing’.

The CHAIR — Just in summary, after that point, you make all decisions?

Mr COHEN — No, we discuss them. I would still discuss a decision with him and I would evaluate his view about it. It is very difficult to know what he does not know and what he does remember. Some of the memories are very hard-wired, and some of the memories are not hard-wired. If I was going to explain something to him, I would start at the beginning and as best I could and fairly put it to him, and then the hard-wiring would probably come out, because he has some very hard-wired.

The CHAIR — And then you make an assessment on whether the advice that he gives you on what he thinks is properly based or not?

Mr COHEN — Yes, and I would reflect back on what he would have done 20 years ago. It is hard, because 20 years ago is 20 years ago, but I would reflect back and then try to real-time it.

Mr CLARK — With your father, you mentioned he is in many respects capable of making his own decisions. With the medical treatment power of attorney — I am assuming that is the one under the Medical Treatment Act — that takes effect only if the donor loses capacity. Have you been able to avoid the need to rely on that power in regard of this case?

Mr COHEN — I am not trying to be too personal, but a dentist has recently suggested several teeth be removed from Father. I have been inquiring as to why, and Father has been inquiring as to why. That is his professional view. I cannot comment on a dentist's professional view, but Father and I have decided that, really, at 97 he does not need to have a series of teeth out, unless they are giving him any pain. We have discussed it, and that is basically where we left it. He still has the teeth in his head.

Mr CLARK — You feel that the general power of attorney in relation to your father gives you enough capacity to do what you need to do to look after him?

Mr COHEN — Yes. And Mother, because Mother is completely non-communicative, really — and has been for quite a while.

Mr BROOKS — Mr Cohen, you touched on a topic before, which was around decision making for your parents. It was the issue of what is in their best interests, I suppose, and maybe their wishes or those of your father, as he has capacity. I was just wondering how you make those decisions.

Mr COHEN — What would be in their best interests?

Mr BROOKS — Do you fall on the side of what is in their best interests or do you — —

Mr COHEN — Normally our best interests are pretty much the same. They have been for a long time. If you are an only child, the idea in life is pretty much the same as your parents. You look after them. My father keeps on suggesting I buy a new car and he has been now for years. It is very tempting, but if you do not need a new car, you do not buy a new car — if that is of any help to you.

I have real difficulties with the medical profession generally with the Medical Records Act and powers of attorney. One group of people I have to deal with regularly I think have lost the powers of attorney four times now. That makes life difficult, so quite often I just pin a photocopy on when I am telling them what is going to happen and tell them if they have lost it again, 'Here's another copy to remind you I still have authority'. That group of individuals I do not think have ever read the Medical Records Act and have no understanding that the patient has any rights. I think they feel they own the patients, or the residents, and any decision made by anyone, including the resident, just would not be considered.

Mr BROOKS — Without drilling down too personally, has there been a situation where either of your parents has had a strong view about a decision and you have felt it has not been in their best interests and you have — —

Mr COHEN — No. I think both of my parents — my mother certainly would not want to be on the planet if she knew the condition she was in, if I might express that view.

Mrs VICTORIA — You mentioned before about Medicare the fact that the powers of attorney dropped off the computer after six months, but they have now resolved that. I suppose two questions come out of that. One is: do you know if that is across the board, that they are now keeping powers of attorney, or is it just in your

circumstance? Also, have you found that with any other institutions where you have had to keep reminding them that the power of attorney is enduring?

Mr COHEN — With Medicare I politely asked them if they were not dealing with me, who would they be dealing with, and there was a stony silence on the other end of the phone. I said, ‘You are more than welcome to go out to my nursing home and talk to my parents’, knowing full well my father would just say, ‘Talk to him if you want to continue down that line’.

The share registries are interesting. I have a person I can speak to at both Computershare and Link. They have been very helpful. They were not in the beginning; they have now been very helpful. If you talk to them, they will talk to you. The individual person will guide anything through their elaborate systems. They have Chinese walls — whatever a Chinese wall is — inside Chinese walls, because each company is treated differently. If you are trying to transfer dividends for everyone across to a bank account, you have to deal with all these different Chinese walls, but it is the same massive computer, I think. Consequently once I sorted that out with them, they did not have a problem. I ended up speaking, I think, to one of their more senior people, and that got sorted pretty quickly and now we do not have any problems with them at all.

Mrs VICTORIA — Were they aware of your parents’ condition, because if it had been a different circumstance, where, for example, it was a temporary loss of capacity and you had this enduring power, then how would they know that you were not to make the decisions?

Mr COHEN — I think a lot depends on what you are trying to do. I was trying to transfer dividends from cheques to bank accounts. I think it makes a fabulous difference if you are transferring them into my parents’ name rather than my named bank account. Consequently that is all we were trying to do. I think if you were transferring it into my named bank account, they would probably still be asking the questions. Of course the result is the same. Once I get it into the parents’ bank account, because of the banking authority, if I am going to take it, I am going to take it. I think that is it. Quite often a third party will ask you why you want to do what you are doing. I think that is a reasonable request. If the request becomes too inquisitive, I just tell them ‘Because I have a power of attorney’.

Mr FOLEY — We have heard some evidence in this inquiry about the need for greater scrutiny of attorneys, those who exercise the power of attorney, including some suggestions that there be a requirement for annual returns on what is being undertaken and some checks and balances for particularly large transactions, should they occur. As someone who has both a legal background and has been active in this area, do you have any views on how either of those arrangements might work?

Mr COHEN — In my particular case, I have not had any problems with the need, because I will probably be the major beneficiary of my parents’ estate. I do not view their money as my money. It is their money. But, for example, my father keeps on saying the classic thing, ‘Go and buy yourself a new car’. He has a very generous view of the world and I have always got on well with my parents. When you mention a large transaction, I do not know what you would mean. Do you mean paying a large bill, for example?

Mr FOLEY — We have heard of some cases where the family home has been sold, not necessarily with acknowledgement of the person without of capacity — those kinds of issues.

Mr COHEN — I have still got the family home. My father, as of about a week ago, felt he may need to move back into the family home. It is not going to happen, but he feels it may need to happen. Of course the largest bill I have to pay for the family — I do not know if you want to hear it — is the state land tax bill on my mother’s beach house that she has not been to for about six years. I do not get an opportunity to go there, either, because I visit my parents each night. Now, I think it would be — what is the right word — Monty Pythonesque for a person to be looking over my shoulder to see whether I should pay that account to the state government. I can understand scrutiny.

Talking about the education aspect, there are several people that should be given an opportunity for education: the person who is giving the power and the attorney who is receiving it. I think third parties could be given a bit more education about what a power of attorney means. Then I think maybe you could give some education to people who feel they need to complain. In the situation that somebody is not looking after somebody correctly, maybe they could be given just guidance or you could start referring them to the *Take control* book. In other words, if you are a disgruntled sibling, you would know where to go to start the ball rolling. I am absolutely

convinced that theft and all that would go on with powers of attorney. I am not an expert, but I just do not see any difference between taking somebody else's money and fraud. I think there are adequate legislative settlements for people who commit fraud, and I think a power of attorney, if you are stealing other people's money, is just a straight-up fraud and should be treated as such and advertised as such. In simple terminology, 'It's not your money, Ralph'. You are spending somebody else's money. It is very hard to know in a nursing home or whatever sort of environment whose money to spend — whether I am spending Dad's money, my money or whose money I am spending. At the end of the day I have counted, but I really do not think it matters in my particular situation.

The CHAIR — Why is it hard to sort that out? They can be drawn from different accounts.

Mr COHEN — For example, I was running around at a quarter past 11 on Friday night getting some medication for my father. Now, what is the easiest way of paying the 50 bucks? The answer is: I just reached into my wallet and paid the 50 bucks. I am not going to claim it back — go through the labour and accounting procedure. It is just too silly. You just pay it and let it go and move on to the next situation.

The CHAIR — Could I bring you back to the education issue that you touched on in response to Mr Foley's question? Could you spell out whether you have given thought to how that might work?

Mr COHEN — I was really impressed. I had not read the latest version of *Take control* until I was coming to see this Committee, and — —

The CHAIR — So you had never seen it before?

Mr COHEN — I have read it previously. I read about a 2006 version, and you have updated it several times since then. As I said, I think that page with the summary on it is a terrific help. I notice you have some videos. I could not help wondering if you could extend those videos to how to make a certified power of attorney and things like that. Maybe they could be put on a CD or something so that people, if they get a copy of the book, can get a CD with it.

The CHAIR — That is information, but what about a requirement before a person assumes the power of attorney that they undergo a training program?

Mr COHEN — I think if you make it too onerous, people will not take on the job. I am not paying myself for this role at all. The other thing is that I think they should be aware that they are personally responsible for what they do. If you have to educate anyone to be aware of that, fine; you are protecting them from themselves.

The CHAIR — Is your view, given that there is a balance that has to be struck here, that it might be sufficient just to send everybody a training pack?

Mr COHEN — Yes, the *Take control*. I assume, rightly or wrongly, that a fair percentage of these are done by lawyers. I do not know if I am right in saying that but there is an opportunity to hand it out and sit them down. Maybe you could get a checklist, a piece of paper with boxes and things like that on it, that the lawyer goes through and ticks a box and then signs off that he has said this to them.

The CHAIR — Thank you very much, Mr Cohen, on behalf of the Committee. As I said earlier, you will receive a copy of the Hansard transcript and you can make slight adjustments to that but obviously not substantial changes. Thank you very much for your time.

Witness withdrew.