

Submission No. 92.1

Date Received

**Human Rights and
Equal Opportunity Commission**

The Hon. John von Doussa, QC
President

6 June 2007

Mr Peter Slipper
Chairman
Inquiry into older people and the law
House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

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BY: LACA:

Dear Mr Slipper,

Inquiry into older people and the law: your request for further information on enduring powers of attorney

We appeared before the House Standing Committee on Legal and Constitutional Affairs ('Committee') in its Inquiry into older people and the law ('Inquiry') on 15 May 2007.

1. Information requested

On that date, members of the Committee requested us to provide further information on enduring powers of attorney legislation in the States and Territories.

More specifically, the Committee also asked us whether there is a need for a federal mutual recognition scheme for enduring powers of attorney ('Enduring Powers').

We provide the following information, by way of response.

2. Possible benefits of a federal mutual recognition scheme

While there is currently provision for mutual recognition of interstate Enduring Powers in the majority of States and the ACT, a federal mutual recognition scheme would seem to have the following benefits. It would:

- (i) resolve the differences between the States and Territories' current legislation on Enduring Powers, and incorporate all the States and Territories within a national system of recognition;
- (ii) facilitate the possibility of a national system of registration of Enduring Powers; and
- (iii) provide individuals and their families with greater certainty and clarity in planning this important aspect of their future.

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3. Recognition under current State and Territory law

NSW, VIC, ACT, QLD, WA and TAS currently provide for mutual recognition of Enduring Powers in similar terms. Under the laws in those States, an Enduring Power created interstate is generally recognised to the extent that it:

- (i) could validly have been created under legislation in the second State or Territory; and/or
- (ii) complies with the statutory requirements in the State or Territory in which it was created.

NT provides more limited recognition of Enduring Powers created interstate. While there is no automatic recognition of interstate Enduring Powers, a power of attorney registered interstate may also be registered under the NT Act and may then meet the criteria under the NT Act for a valid Enduring Power.

SA does not appear to recognise Enduring Powers made in another State or Territory.

We provide a brief summary of the relevant provisions in each State and Territory below.

NSW

- NSW law recognises interstate Enduring Powers to the extent that the powers could validly have been given under the NSW Act: s 25(1) *Powers of Attorney Act 2003* (NSW).
- Interstate Enduring Powers must comply with the requirements of the State or Territory in which they were created.
- Registration of Enduring Powers is only required to authorise dealings with real estate. Otherwise, there is no requirement for an Enduring Power to be registered, although a person may choose to do so: s 51- 52 *Powers of Attorney Act 2003* (NSW).

VIC

- Victorian law recognises interstate Enduring Powers, to the extent that the powers could validly have been given under the VIC Act: s 116 *Instruments Act 1958* (VIC).
- Interstate Enduring Powers must comply with the requirements of the State or Territory in which they were created.
- There are three types of Enduring Powers in Victoria, set out under the following acts:
 - (i) Enduring Power of Attorney (financial) - *Instruments Act 1958* (VIC);

- (ii) Enduring Power of Attorney (medical treatment) – *Medical Treatment Act 1988* (VIC); and
 - (iii) Enduring Power of Guardianship - *Guardianship and Administration Act 1986* (VIC).
- There is no requirement to register Enduring Powers.

ACT

- ACT law recognises interstate Enduring Powers, to the extent that the powers could validly have been given under the ACT Act: s 89(2) *Powers of Attorney Act 2006* (ACT).
- There is no requirement to register Enduring Powers.

NT

- NT law does not automatically recognise Enduring Powers made in another State or Territory: ss 13 –15 *Powers of Attorney Act 2000* (NT).
- A copy of a power of attorney registered under the law of another State or Territory may be registered under the NT Act. However, it will only be recognised as an Enduring Power if it satisfies further requirements of NT legislation: see ss 7(1A) and 13 *Powers of Attorney Act 2000* (NT).
- Enduring Powers must be registered: s 13 *Powers of Attorney Act 2000* (NT).

QLD

- Queensland law recognises interstate Enduring Powers, to the extent that the powers could validly have been given under the QLD Act: s 34(2) *Powers of Attorney Act 1988* (QLD).
- Interstate Enduring Powers must have effect in the State or Territory as a valid power of attorney.
- Enduring Powers may be registered: s 60 *Powers of Attorney Act 1988* (QLD).

SA

- South Australian law does not recognise Enduring Powers made in another State or Territory: *Powers of Attorney and Agency Act 1984* (SA).
- There is no requirement to register Enduring Powers.

WA

- Interstate (or overseas) Enduring Powers may be recognised on application to the Guardianship and Administration Board (created under the WA Act): s 104A *Guardianship and Administration Act 1990* (WA).
- To recognise an interstate Enduring Power, the Board must be satisfied that:
 - (i) the power of attorney corresponds sufficiently (in form and effect) to an Enduring power created under the WA Act; and
 - (ii) it is appropriate to recognise the power of attorney.
- There is no requirement to register Enduring Powers.

TAS

- An Enduring Power that is registered in another State or Territory, under a law that corresponds to the TAS Act, is taken to be registered in Tasmania: ss 42 and 47 *Powers of Attorney Act 2000* (TAS).
- An Enduring Power may be registered in Tasmania (whether or not it was executed in accordance with the TAS Act), if the Enduring Power complies with the law of the State or Territory in which it was executed: s 43 TAS Act.
- Enduring Powers must be registered: s 4 *Powers of Attorney Act 2000* (TAS).

We hope that this information assists the Committee.

Yours sincerely,



John von Doussa
President