

**Supplementary
Submission
No 11b**

**INQUIRY INTO INQUIRY INTO ELDER ABUSE IN NEW
SOUTH WALES**

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The Director
General Purpose Standing Committee No.2
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: gpsnco2@parliament.nsw.gov.au

Attention: Merrin Thompson

Inquiry into elder abuse
Further Addendum to Submission No.11
Furthering the deterring of errant attorneys

RECOMMENDED CHANGES to the *Powers of Attorneys Act 2003* (NSW) (**Act**)

I refer to my submissions to the Committee dated 11 November 2015, letter dated 15 January 2016, and specifically the proposed section 36(4)(e)(v) of the Act (the compensation provision).

In my above letter I inserted in the first line of the proposed compensation provision the words, 'the terms of the instrument creating the power of attorney and' so the provision would be more consistent with other sections in the Act.

I now attach a schedule showing all statutory compensation clauses currently applying in Australian jurisdictions (see columns headed 'Attorney's Liability' and 'Attorney's Conduct', numbered 4 & 5 respectively). To be more consistent with those provisions I suggest that the phrase 'attributable to' in the proposed compensation provision be replaced by the words 'caused by'.

The proposed compensation provision section 36(4)(e)(v) would now read in full as follows (in *italics*):

'36 Interested person may apply for review

'36(4) A review tribunal may, if satisfied that it would be in the best interests of the principal to do so or that it would better reflect the wishes of the principal, make any one or more of the following orders relating to the operation and effect of the power of attorney: ...

(e) an order directing or requiring any one or more of the following: ...

(v) *that an attorney, subject to the terms of the instrument creating the power of attorney and section 85 of the Trustee Act 1925, pay to the principal or the principal's estate compensation for loss (including loss of profits or capital gains) to the principal or the principal's estate caused by the attorney's failure to use reasonable diligence in exercising powers under the power of attorney to protect the interests of the principal'*

Yours faithfully

Richard McCullagh
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STATUTORY OBLIGATIONS ON ERRANT ATTORNEYS TO COMPENSATE PRINCIPALS in Australia

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
JURISDICTION	PLAINTIFF	DEFEND- ANT	<u>ATTORNEY'S LIABILITY</u>	<u>ATTORNEY'S CONDUCT</u>	EXPRESS EXONERATION	FORUM	RELATED CRIMINAL SANCTIONS
ACT Powers of Attorney Act 2006 (ACT)	Principal / Estate	Attorney / Estate	'... to <i>compensate the principal ... for loss caused by ...</i> '	'... failure to <i>comply with this Act in the exercise of a power.'</i>	'acted honestly & reasonably & ought fairly to be excused'	Supreme Court	Liability for compensation applies regardless
Relevant provisions	s 50(1) & (3)	s 50(1) & (4)	s 50(1)	s 50(1)	s 52	s 50(1)	s 60(2)
NSW Powers of Attorney 2003 (NSW)	-	-	-	-	-	-	-
Relevant provisions	-	-	-	-	-	-	-
NT Advanced Personal Planning Act (NT)	Repres- ented person / Estate	Decision maker	'... to pay <i>compensation ... for that loss.'</i>	<i>Convicted of offence of failing to comply with Act with intent to self- benefit</i>	Acted honestly and with care, skill & diligence	Local Court	Up to 7 years imprisonment
Relevant provisions	s 83(3)		s 83(1)	ss 21(1)(b)(iii) & 78(2)	s 21(1)(d)	ss 3 & 83(2)	s 78(2)
QLD Powers of Attorney Act 1998 (QLD)	Principal / Estate	Attorney / Estate	'... to <i>compensate the principal ... for loss caused by ...</i> '	- ' <i>... failure to comply with this Act in the exercise of a power.'</i> - <i>undue influence presumed where attorney is party to a transaction</i>	'acted honestly & reasonably & ought fairly to be excused'	Supreme Court or QCAT (?)	- Up to 200 penalty units - Liability for compensat- ion applies regardless
Relevant provisions	s 106(1)	s 107	ss 66(2) & 106(1)	ss 106(1) & 87	s 105	s 106(7)	ss 66(1) & 106(2)

SA Powers of Attorney & Agency Act 1984 (SA)	Donor	Attorney	<i>'... liable to compensate the principal for loss occasioned by the failure.'</i>	<i>Failure to exercise 'reasonable diligence to protect the interests of the donor'</i>	-	Supreme Court (?)	-
Relevant provisions			s 7	s 7		s 11	
TAS Powers of Attorney Act 2000 (TAS)	Donor	Attorney	<i>'... liable to compensate the principal for loss occasioned by the failure'</i>	<i>Failure 'to protect the interests of the donor' during 'any period mental incapacity'</i>	Decision likely to have been made by the donor had he or she had capacity	Supreme Court or Guardianship & Administration Board(?)	-
Relevant provisions			s 32(1)	s 32(1)	s 32(1B)	ss S3 (1) & 33	
VIC Powers of Attorney Act 2014 (VIC)	Principal / Estate	Attorney	<i>'... to compensate the principal for a for loss caused by ...'</i>	<i>- '...the attorney contravening any provision of this Act.'</i> <i>- eg entering into a transaction in conflict to the interests of the principal</i>	-	Supreme Court or VCAT	Dishonestly causing loss or self-benefiting: Up to 5years imprisonment or 600 penalty units or both
	s 77(2)(b)		s 77(1)	ss 77(1) & 64		ss 80 & 120(1)(g)	s 77(2)(a)&135(3)
WA Guardianship & Administration Act 1990 (WA)	Donor	Attorney	<i>'... liable to the donor for any loss occasioned by the failure.'</i>	<i>Failure to '...exercise ... reasonable diligence to protect the interests of the donor...'</i>	-	WA State Administrative Tribunal	Up to \$2,000
Relevant provisions			s 107(1)(a)	s 107(1)(a)		s 107	s 107(1)