Supplementary Submission No 11c

INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES

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Inquiry into elder abuse

Furthering the deterring of errant attorneys

I refer to the hearing on 18 March 2016 and wish to make the following brief comments by way of follow-up on the topics raised in my submission of 11 November 2015.

Simplifying compensation orders from NCAT

I am prompted by The Hon Dr Phelps MLC alluding to instances of manifest breach of an attorney's duty by, using his example, withdrawing funds from his or her principal's bank account and using it all to gamble at the local TAB. Other reported examples include an attorney selling the principal's house and retaining some or all of the proceeds, or borrowing against the house and applying the advance to a highly speculative investment. Such cases recur in the reported decisions listed in Schedule 2 of my above submission.

I now question whether the suggestion that such a case start in the Guardianship Division of NCAT and then be transferred to the more adversarial Consumer and Commercial Division is necessary.

My proposed section 36(4)(e)(v) of the *Powers of Attorneys Act 2003* (NSW) (**Act**) comes under the heading of orders that 'would better reflect the wishes of the principal...' The example raised by Dr Phelps must surely fall within that description - that it would better reflect with the wishes of the principal that the attorney can be required to immediately repay to the principal the misused money.

It may be simpler for the Guardianship Division having ordered the attorney to furnish accounts, as it may already do under s 36(4)(e)(i), to be empowered to then proceed to decide whether a compensation order should be issued. This would make the procedure simpler, cheaper and faster.

Mandatory certificate of advice to an attorney

My submission suggested the introduction of a requirement that an attorney's acceptance of appointment be subject to a solicitor or other prescribed witness certifying that the basic powers and obligations have first been explained to the attorney and that he or she appeared to understand those matters. This received little comment at the hearing.

I wanted to highlight a reported decision referred to in the submission of Capacity Australia (at footnote 13), *TKX* [2010] NSWGT 10. An attorney sold the principal mother's farm for $248,000 of which only $26,000 remained at the time of the hearing 3 years later and $60,000 could not be accounted for to the satisfaction of the Tribunal. In her 'defence' the attorney,

> 'said she had never read the power of attorney' (paragraph 28)

Such a response would carry even less weight if there was mandatory contemporary evidence at the time of acceptance that a brief explanation was given by a person competent to give that explanation and that she appeared to understand it.

I reiterate that such a procedure parallels that already required on acceptance of appointment of an enduring guardian in NSW.

In the case of *TKX* the Tribunal appointed a financial manager but declined to take any further action by way of review of the power of attorney. Once again, 'the horse had bolted'.

Mandatory registration of grants and revocations by natural persons

The main objection to this raised at the hearing was the increased cost.

That cost currently comprises a registration fee of $105.50 for Land & Property Information and around $30.00 if an agent is engaged to physically lodge the document there.

On any reasonable view, this is a modest impost and one that must currently be paid for all transactions involving registered dealings signed by an attorney.

Yours faithfully

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