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Professor Neil Rees
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Dear Professor Rees,

Review of Guardianship and Administration Laws

The Australian Bankers' Association (ABA) welcomes the opportunity to provide comments on the review of the guardianship and administration laws in Victoria. Our comments are restricted to those terms of reference relevant to banks and other financial institutions, including substitute decision making with regards to administrators[1] and attorneys[2].

1. Introductory comments

The ABA and our member banks watch over the needs of banking customers, including older people and people with a disability. While banks have a number of procedures for dealing with, and products and services available for, their older customers and customers with a disability, substitute decision making means that bank customers may have a third party (formally or informally) transacting on their behalf. The ABA's Code of Banking Practice states that banks will take reasonable measures to enhance their access to transaction services for older customers and customers with a disability[3].

[1] The ABA notes that an 'administrator' means a person appointed by VCAT, under the G&A Act, to make financial and legal decisions for someone with a disability who is not able to make those decisions themself.
[2] The ABA notes that an attorney (general) and enduring attorney (financial) means a person appointed by an individual, under the Instruments Act, to make financial and legal decisions for them, but while they still have decision making capacity. While we recognise that the review is of the G&A Act, there are many issues that are relevant to both guardianship orders and powers of attorney. We consider that an effective system should contemplate how to improve arrangements for all instruments.
[3] Clause 6 of the Code of Banking Practice.
http://www.bankers.asn.au/ArticleDocuments/20040603_FINAL_CODE_MODIFIED_PDF.pdf

1.1 The role of substitute decision making

1.1.1 Formal arrangements

Bank customers who have in place formal arrangements for a third party to act on their behalf, such as an enduring power of attorney, enable an attorney as agent to conduct their banking business or specific banking and financial transactions (where the power or order is limited). Similarly, bank customers may have in place an administration order whereby an administrator is given authority by a tribunal to act on behalf of a customer that does not have capacity to make their own financial decisions.

While banks take great efforts to ensure that their customers can conduct their transactions in a timely and efficient manner and that the person acting as agent is genuine and the instrument or authority they present is authentic, there are some practical impediments.

Firstly, apart from registration of powers with the Land Titles Office/Department of Lands (as required), currently there is no mandatory registration of powers of attorney to verify the holder of the current instrument or authority. Even though there are similarities across states and territories, there are different legislative schemes and an absence of standardisation of laws dealing with guardianship orders and powers of attorney. It is important for governments to address operational problems with instruments, including establishment of a central registry, harmonisation of forms and implementation of inter-jurisdictional recognition of instruments. Some states have in place processes for 'mutual recognition' of enduring powers of attorney established in other states in their Powers of Attorney Acts. We understand that the Standing Committee of Attorneys-General have mutual recognition on its agenda.

Secondly, currently there is limited collaboration between relevant authorities to promote consistent protocols for managing substitute decision making processes by banks and other businesses and service providers. It is important that governments work together to improve continuity of processes across jurisdictions and assist older people and people with a disability to transact business and financial activities by providing the necessary mechanisms and guidance to businesses to help their customers.

Thirdly, currently there is limited community awareness about formal arrangements and substitute decision making. It is important for the Federal Government, in collaboration with state and territory governments, to develop a national community awareness raising campaign and consumer education campaign to facilitate greater use of powers of attorney.

Fourthly, currently there is limited community awareness about formal arrangements involving appointees. It is important for governments to provide information to all parties regarding the powers of administrators, which can be quite broad in terms of money management, investment advice, property management, and more broadly management of financial and legal affairs.

1.1.2 Informal arrangements

Bank customers may also put in place informal arrangements with a third party, such as a member of their support network, to assist them with their banking business and financial transactions. While informal arrangements may be preferred by some people, in particular older people that may feel less familiar with using emerging technologies, such arrangements may leave them more vulnerable to exploitation and financial abuse, even by their trusted family member, friend, social worker or other third party. ASIC's EFT Code states that account holders will not be held liable for transactions which are not authorised by the user. However, where a customer gives their PIN or other access code to another person and there are unauthorised transactions, the customer may be liable for those transactions[4].

Even though banks appreciate that some individuals may prefer informal arrangements as opposed to formal arrangements and the possible motivations for maintaining informal arrangements in terms of financial independence, autonomy and decision making freedom, banks are concerned about customers entering informal arrangements, especially where customers knowingly or unknowingly breach their contract with the bank and/or give up their consumer protections.

Informal arrangements pose a higher risk to the customer and may adversely impact on their contractual arrangements with their bank. Furthermore, informal arrangements impact on a bank's ability to manage its relationship with their customer and cause unnecessary delays in processing transactions. Formal arrangements should be strongly encouraged as this provides the bank with clear instructions and minimises the risk of the customer breaching the terms of their contract.

With this in mind, the ABA believes that governments should take greater efforts to promote the use of legitimate processes for substitute decision making by:

- Promoting awareness of the importance of individuals putting in place appropriate instruments (i.e. powers of attorney) for the management of personal, lifestyle, financial, legal, and medical decisions;
- Ensuring tribunals are adequately resourced to deal with decision making assessments and formal appointment of guardians and administrators (i.e. guardianship orders);
- Promoting education of the extent and limits of instruments, orders or authorities for individuals putting in place formal arrangements as well as those taking on decision making roles, including appointees, others (i.e. carers) and attorneys.
- Removing impediments to the use of powers of attorney and promoting the use of powers of attorney by Australians, and across Australia (i.e. national education campaign, central registry, harmonisation of forms, and cross-jurisdictional recognition of instruments); and
- Ensuring third party arrangements are clear, identifable and accountable so that banks and other businesses can deal with customers and third party arrangements with confidence.

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[4] Section 5 of the Electronic Funds Transfer (EFT) Code.
http://www.fido.asic.gov.au/asic/pdflib.nsf/LookupByFileName/eft-code-nov2008.pdf/$file/eft-code-nov2008.pdf

2. Specific comments

Is there a continuing need for substitute decision making laws?

The ABA believes there is an ongoing need for guardianship and administration laws. The original legislation was enacted in response to the changes arising from the de-institutionalisation of persons with various forms of disability. The need for a clear statutory framework for substitute decision making continues as the implications for decision making support is compounded by Australia's ageing population.

However, the ABA believes that the need is a whole-of-community issue as any individual could suffer a brain injury due to accident leaving them without capacity. The common law supported by the various Supreme Court rules dealing with protective orders could not cope with these modern needs. Therefore, we consider it would not be advisable to repeal these statutory powers and revert to common law.

Having said that, while the ABA believes that the legal system should not be substantially changed, there are elements of the system that require improvement, including:

- Guidance about what powers are exercisable by guardians, administrators and attorneys, including information about roles;
- Clarity about how various instruments, orders and authorities actually give powers to third parties, in the documents themselves;
- Clarity about how various instruments, orders and authorities have been put in place and deal with conflicts of interest;
- Ability for banks and others to verify validity and authenticity of documents, including introducing a central registry to make sure currency of instruments, orders and authorities can be established. (We note comments made on powers of attorney, the same challenges exist in relation to establishing authenticity and possible limitations, etc.);
- Consistency of instruments, orders and authorities across states and territories;
- Cross-jurisdictional recognition of instruments and orders – that is, laws and decisions made by equivalent tribunals as exists in the Victorian legislation. Mutual recognition laws will presumably extend this to New Zealand in the future as well as the recognition of enduring powers of attorney and guardianship; and
- Ability of professional third party service providers to provide support services, including tightening of law around third party services and informal arrangements to make sure that individuals and banks and other businesses are protected in their dealing with third party service providers.

Do we need to have two types of substitute decision makers (administrators and guardians) for financial and personal decisions? Would it be preferable for VCAT to have a range of different financial, medical and lifestyle powers it could provide to one decision maker?

The ABA believes that the current split between enduring guardians and enduring attorneys and/or administrators works well enough. We note that banks and other financial institutions only deal with the enduring attorneys and administrators and there is no obvious conflict in these roles. However, we consider that documents should contain greater information about decisions that may be made by the attorney or administrator. Furthermore, supporting materials should assist educate individuals, attorneys, administrators, professional advisers, businesses and service providers. For example, we consider that governments should prepare interpretative guidance on the extent to which instruments, orders and authorities can be executed and used.

Should plenary guardianship and administration orders be retained? Or should VCAT be required to identify in each case the range of decisions which can be made on a person's behalf?

The ABA believes that either is satisfactory for banks and other financial institutions provided there is clarity as to what transactions are permitted, particularly to the customer the subject of the administration order.

Plenary powers are given to financial managers in NSW subject to the supervision of what was previously known as the Office of the Protective Commissioner (since renamed) who provided financial institutions with Directions and Authority to supplement the Financial Management Order made by the Guardianship Tribunal (the NSW equivalent of VCAT) which set out the specific powers of the financial manager (administrator) and specified what small transactions the customer him/herself could transact for their daily needs despite lack of contractual capacity.

Are there any decisions substituted decision makers cannot make at the moment that you think they should be able to? Are there some decisions that substituted decision makers should not be able to make?

Differences in instruments across states and territories means that there are a number of practical issues with the use of instruments and orders, including conferring different decision making powers, different interpretations/terminology, and different processes. Lack of registration undermines the ability for banks to efficiently check whether an instrument is current, valid or correctly executed.

For example, a bank teller may be presented with a document. Several practical problems arise in terms of establishing authenticity and understanding the differences between instruments. The bank teller would need to work out whether the document is a guardianship appointment or a power of attorney, involving their supervisor/manager. The bank teller would need to also establish the identity of the third party presenting the document. These processes can result in transaction delays due to the lack of a central register, the lack of information about the particular document (and potential limits of instruments), and the lack of awareness of third parties in their role and what they need to do (e.g. present their own identification).

The ABA believes that uniformity would provide integrity to instruments. Harmonisation would improve the ability for instruments to effectively be used to facilitate transactions. However, greater harmonisation should not compromise the ability for individuals to put in place different instruments for different purposes. Mutual recognition is important in order to eliminate uncertainty with the use of instruments. A central register would enable better verification of instruments. A national consumer education campaign would raise awareness and facilitate the use of instruments.

Administrators and attorneys may attempt to borrow in the name or their principal, the borrower with incapacity. The interaction between various laws (contract, agency, and consumer credit) creates difficulties for banks in completing transactions. For example, there may be a requirement to pay a retirement village bond, but the requirement for pre-contractual disclosure to the borrower can make this impractical. If the guardian or attorney puts in place a guarantee on the security of the customer's property, this involves the administrator or attorney in a conflict of interest (not overcome by the form of enduring power of attorney and usually not contemplated by the guardianship orders). If the guardian or attorney is required to complete the financial and property transaction, it may be that there is a limit on the powers which means that only part of the transaction can be completed (e.g. some instruments in terms of retirement decisions consider these to be lifestyle choices, and the instrument may only relate to financial and legal decisions).

The ABA believes that generally borrowing by administrators or attorneys should not be contemplated, but there may be rare circumstances where purchase or sale of property may not be practicable. We consider that better awareness of the implications of different instruments and possible limitations should seek to address individuals' needs, but also the needs of banks and other businesses in dealing with these documents. We also consider that tribunals may need to be more engaged in facilitating transactions where there may be difficulties with particular guardianship orders.

The ABA believes a gap in the current legislation is in the transition of children with a disability to adulthood. While minors, their parents are their natural guardians and under the Family Law Act their parents have management of their children's financial affairs, when these individuals reach 18 years of age these protections are lost and they have no legal protections without administration orders. We consider that arrangements need to be activated to provide ongoing substitute decision making arrangements. Lack of arrangements creates risks for banks and other financial institutions and affects the needs of the individual to have normal access to all goods and services, banking or otherwise.

Is there a need for new laws that formally recognise supported decision making? How should any supported decision making laws operate?

As stated above, the ABA is concerned with the use of informal arrangements. Therefore, we do not encourage the development of broad supported decision making laws[5]. Having said that, we recognise that in discrete and limited circumstances, supported decision making is already institutionalised. For example, third party service providers may act on behalf of bank customers, including financial counsellors that assist people with financial difficulties, government or private sector carers that assist people with decision making or cognitive impairment, and other services that assist people with disabilities (i.e. National Relay Service).

[5] The ABA notes that "supported decision making" is where individuals rely on the advice and assistance of others when making decisions, for example, they may call upon their support network, such as their parents, other family members or friends to help them make decisions.

In this regard, the ABA notes that there is typically uncertainty regarding how banks are expected to engage with individuals that act on behalf of bank customers without arrangements recognised through statute. Uncertainty can lead to frustrations on the part of those third party service providers, the individuals they are attempting to transact on behalf of, and the banks. We consider that greater formality and certainty is necessary for these arrangements to operate effectively and in a manner that assists bank customers without exposing them or their bank to inappropriate liability risks. Banks should not be exposed to legal risks in terms of privacy and common law duties, contractual law duties or other legal duties (i.e. anti-money laundering identification obligations). Bank customers should not be exposed to legal risks in terms of loss of consumer protections and potential fraudulent activity.

The ABA is concerned about supported decision making or co-decision making arrangements that do not establish clear boundaries for all parties. While we recognise the desire to implement these kinds of arrangements, there would be significant and substantial practical and legal implications which would need to be well thought through. For example, there has been a suggestion made by some for a model where certain everyday banking decisions could be undertaken by people with decision making disabilities, but larger financial decisions would be subject to greater third party oversight. This model would be extremely problematic from a business and operational perspective. Furthermore, it would be problematic for individuals where lack of clarity around roles or ambiguity regarding protections would result.

The ABA believes that supported decision making or co-decision making may expose individuals to liability and legal risks, rather than provide them with greater autonomy, decision making freedom and flexibility. We consider that it is inappropriate for banks and other businesses to be expected to identify or determine whether capacity or incapacity exists. Banks are not in a position (or qualified) to establish (or question) whether a customer has capacity. Evidence of registration should be sufficient for a bank to rely on when conducting transactions for the administrator or attorney. Similarly, some other form of verification of the authenticity of the third party arrangements should exist so that banks and other businesses can transact with third parties with confidence.

The ABA provides a copy of the ABA submission made on the inquiry into powers of attorney in Victoria. Many of the specific comments we make are relevant to this review.

The ABA would be happy to discuss any of the issues raised in our submission with you further.

Yours sincerely

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