

Memo

To: Margery Nicoll, Acting Chief Executive Officer, Law Council of Australia

From: Sam Pandya, President, Law Institute of Victoria

Subject: Elder Law Issues – Proposed engagement with the Australian Banking Association and Best Practice Guide in relation to Elder Financial Abuse

Date: 8 May 2020

INTRODUCTION

1. The Law Institute of Victoria (**'LIV'**) is Victoria's peak body for lawyers and represents about 19,000 people working, and studying, in the legal sector in Victoria, interstate and overseas. The LIV welcomes the opportunity to provide feedback to the Law Council of Australia (**'LCA'**) on the following issues:
 - a. LCA engagement with the Australian Banking Association (**'ABA'**) on 'emerging legal issues in banking operations. Specifically, deceased estates and a national register of enduring power of attorney documents to inform a proposal to the LCA Directors; and
 - b. revised draft best practice guide for legal practitioners on elder financial abuse (**'Draft Guide'**), which will be put to the LCA Directors for approval at their June meeting.

ENGAGEMENT WITH THE ABA

2. The LCA's Elder and Succession Law Committee propose to:
 - a. open a dialogue between the legal profession and the banking industry, with a view to developing more detailed guidance for banks in dealing with deceased estates; and
 - b. consider creating a body that could deal with issues as they arise.

3. The LIV supports the LCA engaging more directly with the banking industry on matters concerning deceased estates and powers of attorney. The LIV recognises that the proposal is made having regard to Recommendation 8-1 of the Australian Law Reform Commission's report *Elder Abuse – A National Legal Response* ('**ALRC Report**'). This report recommended that the LCA develop best practice guidelines for legal practitioners in relation to preparation of wills and other advance planning documents, having regard to:
 - a. elder abuse in probate matters;
 - b. common risk factors associated with undue influence;
 - c. the importance of taking detailed instructions from the person alone;
 - d. the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents; and
 - e. the importance of ensuring that the person has "testamentary capacity".

4. In addition to the Recommendation 8-1, the scope of any dialogue with the banking industry should not be limited to the recommendation concerning the legal profession. It should also extend to engaging with the ABA around Recommendation 9-1.

BROADER SCOPE OF ENGAGEMENT: ALRC RECOMMENDATION 9-1

5. The LIV is concerned that Recommendation 9-1 has not yet been fully implemented by the banking sector. The LIV does not have any ongoing involvement with the banking sector in terms of consultation or policy development.

6. Recommendation 9-1 states the following:

The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of vulnerable customers, in accordance with the industry guideline, Protecting Vulnerable Customers from Potential Financial Abuse. The guideline should set out examples of such reasonable steps, including in relation to:

- (a) training staff to detect and appropriately respond to abuse;
- (b) using software and other means to identify suspicious transactions;
- (c) reporting abuse to the relevant authorities, when appropriate;
- (d) guaranteeing mortgages and other loans; and
- (e) measures to check that 'Authority to Operate' forms are not obtained fraudulently and that customers understand the risks of these arrangements.

7. It was noted in the ALRC Report that:

- a. banks 'are often in a good position to detect financial elder abuse and protect their at-risk customers';¹
- b. the ABA itself submitted that 'banks can 'play an important role in recognising potential financial abuse';²
- c. as at the time the ALRC Report was published, the Banking Code of Practice³ ('**Banking Code**') did not contain provisions specifically directed at elder abuse;⁴
- d. while the Banking Code is not mandatory, any signatories to the Banking Code are contractually obliged to adhere to its obligation;⁵
- e. an industry guideline sets out 'best practice' in dealing with a bank dispute about financial abuse, but compliance with the guideline is voluntary;⁶
- f. an industry guideline sets out 'best practice' for banks dealing with attorneys, administrators and guardians, but compliance with the guideline is voluntary.⁷

¹ Australian Law Reform Commission report No. 131 *Elder Abuse – A National Legal Response* (2017), [9.16]

² *Ibid.*

³ In effect from 1 March 2020, available at <https://www.ausbanking.org.au/banking-code-of-practice-2020-release/>

⁴ *Ibid.*, [9.24]

⁵ *Ibid.*, [9.21]

⁶ ABA Industry Guideline "Protecting vulnerable customers from potential financial abuse" (December 2014) https://www.ausbanking.org.au/wp-content/uploads/2019/05/Industry_Guideline_Protecting_vulnerable_customers_from_potential_financial_abuse2.pdf

⁷ ABA Industry Guideline "Responding to requests from a power of attorney or court-appointed administrator" (December 2014) https://www.ausbanking.org.au/wp-content/uploads/2019/05/Industry_Guideline_Responding_to_requests_from_a_power_of_attorneys_or_court-appointed_administrator2.pdf

8. The provisions of the current Banking Code address elder financial abuse in some respects:
 - a. Signatories undertake to take extra care with customers experiencing vulnerability (clause 38), including as a result of age-related or cognitive impairment or elder abuse or elder financial abuse.
 - b. Signatories undertake to 'train our staff to act with sensitivity, respect and compassion if you appear to be in a vulnerable situation' (clause 39), and to provide express support when providing a banking service to vulnerable customers (clauses 40 and 41).
 - c. The Banking Code provides that co-borrowers who will not receive a substantial benefit from a loan will not be approved unless the lender is satisfied that the co-borrower understands the risks of the proposed arrangement, and that the co-borrower is not experiencing financial abuse (clause 54).
9. The Banking Code does not, however, make any reference to the industry guideline *Protecting Vulnerable Customers from Potential Financial Abuse* nor does the Banking Code commit signatories to taking reasonable steps to prevent the financial abuse of vulnerable customers in accordance with the industry guideline and Recommendation 9-1.
10. LIV members understand that individual banks and financial institutions have adopted their own guides for customers around elder financial abuse and similarly, that individual banks and financial institutions have developed and broadened their internal training programs for front-line staff around elder financial abuse. What is missing, however, is up-to-date industry guidelines for ABA members (having regard to Recommendation 9-1 and incorporating industry guidelines in the Banking Code).
11. The LIV submits that the LCA should consider engaging the ABA on the following:
 - a. Review of the industry guideline *Protecting Vulnerable Customers from Potential Financial Abuse* (last reviewed December 2014),

having particular regard to the following aspects of

Recommendation 9-1:

- i. Training staff to detect and appropriately respond to abuse;⁸
- ii. Using software and other means to identify suspicious transactions;⁹
- iii. Reporting abuse to the relevant authorities, when appropriate;¹⁰
- iv. Measures to check that 'Authority to Operate' forms are not obtained fraudulently and that customers understand the risks of these arrangements.¹¹

APPROPRIATENESS AND FORM OF LCA ENGAGEMENT WITH THE ABA

12. It is the LIV's view that:

- a. It is appropriate for LCA, as the national peak body, to engage with ABA, recognising the fact that the banking industry is well placed to identify elder financial abuse or suspected elder financial abuse;
- b. LCA consultation via state and territory based peak bodies should continue, however, in the interests of agility and flexibility it may be worth considering a specific collaborative body;
- c. If a specific collaborative body was to be formed to explore legal issues that impact on banking operations generally, including elder financial abuse, it is suggested that the Customer Owned Banking Association also be involved (peak body for credit unions) from time

⁸ Signatories to the Banking Code undertake to provide cultural awareness training to staff who regularly assist customers in remote indigenous communities (clause 37), to recognise a customer or potential customer that may qualify for a basic, low or no fee account (clause 47) and to undertake staff training on the Code where a signatory is found to have breached the code (clause 215). There is no express undertaking to provide staff training to detect and appropriately respond to abuse.

⁹ "Technology is rapidly changing the banking experience, making it more convenient, more mobile and more transparent than ever" (Banking Code introduction per CEO, ABA). There is no express provision in or undertaking given in the Code to ensure that development of technology also has regard to identifying suspicious transactions.

¹⁰ The recommendation that banks ought to report abuse to relevant authorities when appropriate should be the subject of dialogue between the ABA and LCA.

¹¹ A review of the ABA industry guideline "*Responding to requests from a power of attorney or court-appointed administrator*" may also be considered in relation to authority to operate forms.

to time or ongoing, particularly concerning practical steps that can be taken to address these issues (as opposed to regulatory or banking/finance legal issues).

- d. If informal dialogue is preferred, at a minimum the purpose and objectives should be developed collaboratively.

DETAILED GUIDANCE FOR BANKS IN DEALING WITH DECEASED ESTATES

13. The Banking Code provides guidance around how signatories will help with deceased estates (Part 9, Chapter 45). In short, signatories commit to:
 - a. Providing clear and accessible information on what the deceased's representative can do to manage a customer's account in the event of their death.
 - b. Identify fees for products and services that can no longer be provided as a result of the customer's death, and stop charging those fees.
 - c. Provide access to information about the deceased's account prior to probate or letters of administration being granted (where a request made by a person identified as authorised by a will, a next of kin, or a person who has applied for letters of administration).

14. There are several ways in which banks are commonly involved with deceased estates, including:
 - a. Pre-probate: identifying accounts or loan facilities held by the deceased for the purpose of preparing an application for grant of probate or letters of administration.
 - b. Administration: co-operating with requests for information from the executor concerning transactions that occurred on the deceased's accounts during the deceased's lifetime (including elder financial abuse investigations).
 - c. Administration: disbursing funds held in deceased's accounts to executor or beneficiaries, closing accounts held in deceased's name.

15. We set out at **Annexure A** and **Annexure B** some anecdotal comments and case studies from LIV members and their staff in relation to their dealings with banks in the course of probate and administration of deceased estates.
16. The LIV proposes that the ABA consider creating a body that could deal with these issues as they arise.

NATIONAL POWER OF ATTORNEY REGISTER

17. The LIV is aware of the ABA position concerning a national power of attorney register. The LIV receives regular updates from members who are involved with the project to harmonise powers of attorney legislation across the state and territory jurisdictions and the development of a national register.
18. We understand that the Attorney-General convened consultations concerning a national power of attorney register in February 2020 in Canberra. Representatives of all states and territories (including state-based justice departments) attended as did representatives of Public Advocates, Tribunals, the banking industry, Law Societies, Elder Abuse legal centres, COTAs and OPANs attended. It is understood from that consultation that:
 - a. The current proposal only relates to financial enduring powers of attorney (and excludes personal powers of attorney and general powers of attorney).
 - b. The current proposal excludes registration of Tribunal guardianship or administration orders.
 - c. How a national register may work where a power of attorney commences upon a loss of capacity.
 - d. Access to the register balanced against privacy concerns.
19. We understand that the bank representatives present at the consultation reported that approximately 30% of powers of attorney that banks see are not validly executed.
20. The LIV is of the view that while there may be some utility in the LCA engaging with the ABA in relation to a national register, the profession's

primary focus should be on ensuring participation in and feedback to the harmonisation project convened by the Attorney General. It is the LIV Committee's hope that a basic powers of attorney register be established in the immediate or medium term, with more complex issues to be resolved subsequently.

CONCLUSION

21. Should you have any queries about this memo, please contact Michelle Luarte, Lawyer to the Elder Law Section (03 9607 9413) or Alexander Laurence, Paralegal to the Elder Law Section (03 9607 9565 or ALaurence@liv.asn.au).

Kind regards,

Sam Pandya
President
Law Institute of Victoria

ANNEXURE A

LIV COMMITTEE MEMBER OBSERVATIONS REGARDING BANKS AND DECEASED ESTATES OR ESTATES OF FINANCIAL ADMINISTRATION CLIENTS

- **Need for clear guidelines on fee waivers on compassionate grounds**

When engaging with Banks to investigate financial abuse on behalf of executors, Financial Administration clients say the fees involved in obtaining statements can sometimes be prohibitive for estates or clients who have been left with little or no money. Clear guidelines for fee waivers on compassionate grounds would be useful.

- **Need for more thorough bank searches**

On occasions Banks have failed to identify accounts held by Financial Administration clients due to subtle variations between the Bank's records and our own with respect to the client's names. Banks should be encouraged to be more exhaustive in their searches and ask for more information where required.

- **Large bank withdrawals of people under administration orders**

On occasion, clients were identified as being subject to administration orders, however were allowed to withdraw very large sums of money from their accounts in branch while relying on the assistance of a "friend" who translated for them. Such transactions should immediately raise red flags in banks and they should require attendance by an appropriately licenced independent translator in addition to the best practice set out in the industry guideline *Protecting Vulnerable Customers from Potential Financial Abuse*¹². Where they are on notice of an individual's vulnerability, Banks should also take steps to ensure that the person concerned is not subject to a Financial Administration order before large withdrawals are made.

- **Care in accepting guarantees from at-risk individuals**

Banks should be extra cautious when accepting guarantees from at risk individuals or elderly individuals. The Banking Code (in respect of guarantees,

¹² Australian Banking Association, 'Protecting vulnerable customers from potential financial abuse' (Guideline, December 2014) < https://www.ausbanking.org.au/wp-content/uploads/2019/05/Industry_Guideline_Protecting_vulnerable_customers_from_potential_financial_abuse2.pdf>.

Chapter 26)) ought to reflect the provisions of clauses 54 to 56 (in respect of co-borrowers).

- **Exercising caution with those who have lost capacity**

We have seen instances where banks accepted instructions from estate representatives notwithstanding that the source of those instructions were executors who had been found by the tribunal to have lost capacity. When put on notice that an executor has lost capacity, banks should be reviewing who is capable of giving directions on behalf of the estate.

ANNEXURE B

LIV COMMITTEE MEMBER CASE STUDIES REGARDING BANKS AND DECEASED ESTATES

- A Committee member has reported issues with **pre-probate requests for information where named executors may be in dispute:**
 - Three executors are named in a deceased's Will.
 - One of the three named executors was the deceased's attorney during the deceased's lifetime. It appears that the attorney preferred the attorney's interests over the deceased's during the deceased's lifetime.
 - The attorney/executor is resistant to a wholesale investigation of the lifetime transactions.
 - The other two executors intend to bring a Court application in relation to probate, and seeking to exclude the attorney/executor from participating in the grant.
 - The other two executors cannot commence that Court application without some evidence of the attorney/executor's decisions during the deceased's lifetime.
 - In the pre-probate period, the two executors attended in branch and wrote to the deceased's banks with a request for documents (bank statements, authority to operate forms, terms and conditions on accounts). The two executors provided an original certified copy of the Will as well as identification of themselves.
 - The bank refused to disclose any documents to the executors until probate had been granted, notwithstanding executors owe obligations to the estate prior to any grant of probate.

- A Committee member has reported having **difficulty in liaising with the bank on behalf of the executor of a deceased estate:**
 - The Committee member acted for an executor of a deceased estate. The deceased had been the victim of a scam during her lifetime.
 - The executor instructed the LIV Committee member to request copies of various documents concerning the deceased's accounts (including authority to operate forms, bank statements, terms and conditions of account, file notes).
 - The request was made in writing to the bank's customer service team.

- The bank's customer service team unilaterally decided to refer the enquiry to its deceased estate team.
- After some delay, the deceased estate team advised the LIV Committee member that it did not have access to the documents requested and could not assist, and that the request ought to be put to the customer service team.
- Requests for information by customers (or a validly appointed attorney, an administrator or the executor of a customer's deceased estate) should be streamlined. Executors of deceased estates may have to deal with claims (on behalf of the deceased) relating to elder financial abuse during the deceased's lifetime, lifetime transactions, undue influence or unconscionable conduct. Where a request for information or documents may be better handled by the general inquiry line (for example, priority banking enquiries lines), those requests are anecdotally directed to the deceased estate teams which adds delay to any request for information. This can cause a significant delay in progressing the matter – anecdotally the deceased estate teams within banks are not typically able to access or provide documents concerning transactions during the deceased's lifetime.