ENDURING POWERS OF ATTORNEY: CINDERELLA STORY OF THE 80s

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Mrs Creyke outlines the emergence of legislation providing for the creation of Enduring Powers of Attorney ("EPAs"). She suggests reasons for their growing popularity as a way of managing the affairs of an increasingly ageing population. The article examines the English legislative model and the models adopted throughout Australia, including the recently enacted Western Australian scheme. The EPA and guardianship powers (including consent to medical treatment) proposed by the Australian Law Reform Commission and implemented in the Australian Capital Territory are also discussed. The author concludes that powers of attorney are an established device which have been adapted to fulfil a contemporary social need.

This article is about Enduring Powers of Attorney ("EPAs"), the recently extended form of that well-known device, the power of attorney. Its writing was prompted by the passage, in September 1990,[1] of EPA legislation in Western Australia,[2] which is the final jurisdiction[3] in Australia to provide for this special form of agency. Western Australia has been able to draw on the experience of other jurisdictions to the advantage of its EPA scheme.

The metamorphosis of powers of attorney has occurred in two stages. The first change - the development of the enduring form of power of attorney[4] - took place when, by legislation, an ordinary power was permitted to continue

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1. Assented to on 7 September 1990.
2. Guardianship and Administration Act 1990 (WA) Pt 9. At the time of writing, the Act had not been proclaimed.
3. The first was Victoria. See the Instruments (Enduring Powers of Attorney) Act 1981 (Vic).
4. In NSW it is known as a "protected power of attorney": Conveyancing Act 1919 (NSW) s 163D.

after the legal incapacity of the principal.[5] The second - a proposal of the Australian Law Reform Commission which has now been implemented in the Australian Capital Territory - would allow an agent under an enduring power to make personal as well as property and business decisions on behalf of an incapable principal. In other words the attorney may now be given guardianship powers.

I. ENDURING POWERS OF ATTORNEY

The impetus for the development of EPAs is well documented. In the early 1950s, Virginia set up the first scheme for an enduring (or "durable" as it is generally known in the United States) power of attorney.[6] In 1964 a United States Model Act, the Special Power of Attorney for Small Property Interests Act, appeared. That was followed by the United States Uniform Probate Code, which was approved in 1969 and contained a blueprint for EPA legislation.[7] Those two models have been used as the basis for many of the schemes adopted in the United States. Enduring powers of attorney legislation exists in over three quarters of the States of the United States of America. These developments were followed by a spate of recommendations along similar lines by law reform bodies in Canada, England and Australia.[8]

5. The terms "principal" and "agent" or "attorney" will be used in this paper to describe the parties to a power of attorney. The alternative terminology which is found in the legislation in a number of Australian jurisdictions is "donor" and "donee". Since that terminology is suggestive of benefaction it will not be adopted here.
6. 1954 Va Acts 486.
7. Ss 5-101 to 5-105: "When Power of Attorney Not Affected by Disability".
8. Eg, Ontario Law Reform Commission *Report on Powers of Attorney* (1972); New South Wales Law Reform Commission *Working Paper on Powers of Attorney* (1973); Law Reform Commission of the Australian Capital Territory *Report on the Management of the Property and Affairs of Mentally Infirm Persons* (1973); Manitoba Law Reform Commission *Report on Special, Enduring Powers of Attorney* (1974); New South Wales Law Reform Commission *Report on Powers of Attorney* (LRC 18 1974); New South Wales Law Reform Commission *Report on Powers of Attorney and Unsoundness of Body or Mind* (LRC 20 1975); Law Reform Commission of British Columbia *Report on The Law of Agency Part II - Powers of Attorney and Mental Incapacity* (LRC 22 1975); Law Reform Committee of South Australia *Report relating to Powers of Attorney* (47th Report 1981); The Law Commission *The Incapacitated Principal* infra n 16; Law Reform Commission of Tasmania *Report on Powers of Attorney* (Report No 39 1984); Queensland Law Reform Commission *Report on a Bill to Amend the Property Law Act 1974-1986* (1987); Law Reform Commission -Australia *Enduring Powers of Attorney* infra n 13; Law Reform Commission of Victoria *Enduring Powers of Attorney* (Discussion Paper No 18 1990); Law Reform Commission of Victoria *Enduring Powers of Management* (Report No 35 1990); Alberta Law Reform Institute *Enduring Powers of Attorney* (Discussion Paper No 7 1990).

The response in those jurisdictions which have considered the matter has been relatively swift. Legislation has been passed in nearly all of the jurisdictions in which a law reform commission has reported.[9] EPA legislation has also been passed in several jurisdictions in Australia where no local law reform commission reports were undertaken.[10]

There are several reasons for the growth in popularity of EPAs. The first is a matter of convenience. An agent, for example, who has been managing the affairs of an elderly relative is familiar with the affairs of the principal, is presumably trusted by the principal and is, therefore, in the best position to continue the management role.

Secondly, often the only alternative is to have a court or guardianship and management tribunal appoint a property manager. This is at the least a time-consuming and public procedure but, depending on the nature of the determining body, may also be complex, cumbersome and expensive.[11] It therefore makes good sense to use a device which has the virtues of privacy, simplicity and cheapness.

Thirdly, it is often difficult to determine at what point a principal becomes incapable. An elderly person, for example, with Alzheimer's disease, will have periods of lucidity and periods of confusion. This can continue for years. Permitting an agent, who has been appointed with this possibility in mind, to continue to operate the power whether the principal is competent or not, avoids the need to determine when the person would be classed as legally incapable.

Finally, and perhaps most persuasively, an EPA provides a means to legitimise community practice. There is a commonly held belief amongst lay attorneys that they are entitled to continue to operate an ordinary power despite the mental incapacity of the principal. Even amongst professional agents similar misconceptions arise. Thus in the Australian Capital Territory

9. *Australia*: Conveyancing Act 1919 (NSW) (as amended in 1983); Powers of Attorney and Agency Act 1984 (SA); Powers of Attorney Act 1934 (Tas) (as amended in 1987); Powers of Attorney Act 1956 (ACT) (as amended in 1989); Property Law Act 1974-1990 (Qld) (as amended in 1990).
Canada: Power of Attorney Act 1979 (BC) c 334; Powers of Attorney Act 1980 (Ontario) c 386; Powers of Attorney Act 1980 (Man) c 4.
England and Wales: Enduring Powers of Attorney Act 1985 (UK).

10. Instruments Act 1958 (Vic) (as amended in 1981); Powers of Attorney Act 1980 (NT); Guardianship and Administration Act 1990 (WA) (not proclaimed in June 1991).

11. In the Australian Capital Territory considerable expense and stigma is also involved since property managers for incapable people may only be appointed by the Australian Capital Territory Supreme Court after a formal finding of incompetency: Lunacy Act 1898 (NSW) (as it applies in the ACT) Pts VII and VIII.

several years ago, certain trustee and agency companies were advertising as one of their services a "dormant power", that is, one which appointed the company as agent but which only commenced to operate when the principal was no longer legally capable![12] Since the service preceded the Territory's EPA legislation the agency's claims were clearly incorrect.

In accepting the need for reform of the law, the Australian Law Reform Commission listed the following advantages of an EPA:

1. it allows the principal to plan for the future;
2. it allows the principal to choose who is to manage his or her affairs; and
3. it avoids the stigma of the principal having to be declared incapable.[13]

The Commission summed up its findings in favour of EPAs as follows:

> When a person has the foresight to make arrangements for his or her impending incapacity, it is most unsatisfactory if the law frustrates that planning. There is a need for a cheap, simple, self-help procedure, subject to appropriate safeguards, whereby a person can prepare in advance for his or her possible incapacity. The need for enduring powers of attorney is particularly pressing in a 'greying' population....[14]

A. EPA Legislation

For these reasons, over the last 35 years (ten in Australia), considerable attention has been given to devising a power which would remain in force after the principal has become mentally incapable. In developing legislation to implement this "new-look" form of power of attorney, two ideas have been uppermost: the need to preserve the simplicity, effectiveness and inexpensive nature of the ordinary power; and the need to ensure that there are sufficient safeguards to protect a principal who has become incompetent.[15] Protection is important because, unlike the position under ordinary powers of attorney,

12. Use of an EPA would also avoid the need for other doubtful practices such as those of the ACT solicitor/attorney who deliberately refused to visit a client who was becoming senile so that he was not put on notice that his principal had become incapable. Presumably he was attempting to take advantage of the legislative protection for attorneys and third parties (to be found in all powers of attorney statutes) who enter into transactions unaware that the power has lapsed due to the principal's mental incapacity. See, for example, Powers of Attorney Act 1956 (ACT) s 8.
13. Law Reform Commission - Australia *Enduring Powers of Attorney* (Report No 47 1988) ("ALRC 47") para 13 (footnotes omitted).
14. Ibid.
15. Except in Victoria where the safeguards are minimal: Instruments Act 1958 (Vic) ss 114-118.

the principal can no longer supervise decision-making by the attorney. Indeed, a person may even execute an EPA while in a vulnerable state and care must be taken to provide for execution formalities which protect the principal from pressure to appoint a self-interested agent.

All EPA legislation, therefore, imposes requirements which must be fulfilled when the EPA agent is appointed and extra controls are placed on the agent when exercising authority under the EPA. The extent of these extra safeguards is the issue which has received most attention by law reform bodies. Three schemes will be examined: the English model; that recommended by the Australian Law Reform Commission and substantially adopted in the Australian Capital Territory; and the Western Australian package.

1. The English Model

The English Law Commission in its 1983 Report identified what it called a core of protective provisions. This "basic scheme" included the following:

1. a requirement that the EPA instrument contain a statement by the donor showing an intention that the power should be capable of surviving the donor's mental incapacity;
2. a requirement that the donor's signature be witnessed by someone other than the attorney; and
3. machinery whereby the EPA could be terminated (or at least controlled) by the intervention of a court or some other official body.[16]

All Australian legislation for EPAs contains these basic safeguards. Reports in Victoria and New South Wales, however, about "granny-napping" and other abuses show that they are inadequate on their own.[17]

The English Law Commission[18] opted for more extensive protective measures than those contained in the basic model. Most other jurisdictions

16. The Law Commission *The Incapacitated Principal* (Report No 122 1983) para 3.17.
17. Eg, "More Old People Exploited" The Sydney Morning Herald, 5 March 1987, 1; The Age 18 July 1987. The Public Advocate for Victoria also made submissions to the Australian Law Reform Commission on various abuses which have occurred in that State: ALRC 47 supra n 13, para 14, fn 1.
18. Professor J T Farrand, commenting on the Law Commission's recommendation that the "basic model" was insufficient, noted wryly that "the Law Commission did not regard these basic safeguards as offering sufficient protection for the elderly and highly suggestible people of England and Wales": J T Farrand "Enduring Powers of Attorney" in J Eekelaar and D Pearl (eds) *An Aging World: Dilemmas and Challenges for Law and Social Policy* (Oxford: Clarendon Press, 1989) 637, 642.

where EPA legislation exists or is proposed have done likewise. Those contained in the English Enduring Powers of Attorney Act 1985 are, however, the most far-reaching. Superimposed on the basic model are the following requirements:

(a) the power must be registered with the Court of Protection when the attorney "has reason to believe that the [principal] is or is becoming mentally incapable";[19]
(b) before registration, the attorney must notify the principal's closest relatives as well as the principal of the intention to register;[20]
(c) the attorney cannot disclaim the power "unless and until [he] gives notice of it to the court";[21] and
(d) the EPA form contains explanatory information[22] - as one writer put it, "like a Government Health Warning on cigarette packets" - about the nature of an EPA, the effect of granting such a power, and the obligation on the attorney to register the EPA.[23]

The use of the key safeguards of notification[24] and registration has been criticised. The Australian Law Reform Commission noted in its report on enduring powers that "[i]n the United Kingdom the scheme for enduring powers of attorney is so complicated that it is virtually impossible to use one without professional legal help".[25] An English Law Commissioner commented that "[t]he potential impact of such notices, asserting the onset of mental incapacity, upon the various recipients does not seem to have been contemplated by the Law Commission".[26] The effect of these requirements is to produce a cumbersome, public, bureaucratic system, which can cause distress to those involved and which is little different from a formal guardianship or property management scheme.[27]

19. Enduring Powers of Attorney Act 1985 (UK) s 4(1).
20. Ibid, s 4(3), Sch 1.
21. Ibid, s 4(6), 7(1)(b).
22. Ibid, s 4(3), Sch 1; Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (UK), SI 1987/1612.
23. Farrand supra n 18, 642.
24. Although the general rule is that no more than three relatives are entitled to receive notice, that rule cannot always be adhered to, for example, where all the relatives of a particular class must be notified: L Griffiths "The Enduring Power of Attorney" (1987) 17 Fam L 7, 10.
25. ALRC 47 supra n 13, para 14 (footnote omitted). See also Alberta Law Reform Institute supra n 8, 37, 54-57.
26. Farrand supra n 18, 642.
27. New Zealand, which, in its Protection of Personal and Property Rights Act 1988, substantially adopted the English scheme, did not introduce registration.

The arguments for registration recognise the practical problems which can arise where the principal grants several EPAs. A principal may, of course, make as many powers as he or she wishes. Thus one agent, perhaps a member of the principal's household, could be given authority to pay the household accounts, and another, such as the family solicitor, family accountant or the public trustee could be entrusted with the power to manage a share portfolio or the buying and selling of property. Different agents may be given powers to deal with the same matters.

In the case of ordinary powers, the only brake on such practices is the good sense of the principal or caution on the part of agents. EPAs are, however, likely to be contemplated by principals when they face a decline in their faculties and reduction in their ability to supervise. Good sense may be lacking. It is a time when unscrupulous people seek to take advantage of a principal's loss of competence. The requirement for public registration of EPAs appears to be one way to inhibit the grant of multiple EPAs.[28] It also provides a mechanism whereby business people can confirm the authenticity of an attorney claiming to have wide powers.

Against this, in every jurisdiction, except England, where a law reform commission body has suggested registration, that suggestion was not implemented in the subsequent legislation.[29] In the United States of America the United States Model Act requires that the durable power be filed in a court office and a certified copy be filed or recorded in specified public offices. At this stage it is not clear how many States in the United States have opted for this model or how well it works. Closer to home, the Northern Territory requires EPAs to be registered before they are valid[30] and Tasmania requires all its powers of attorney, including enduring powers, to be registered under the Tasmanian Registration of Deeds Act 1935.[31]

28. Possibly another way is for the principal to make a second enduring power which would have the effect of revoking the first EPA: Law Reform Commission of Victoria supra n 8, 8.
29. Ontario Law Reform Commission supra n 8, 32; Manitoba Law Reform Commission supra n 8, 12; Law Reform Commission of Tasmania supra n 8, 14; Law Reform Commision of Victoria *Enduring Powers of Management* supra n 8, 6. The Tasmanian powers of attorney legislation already required that ordinary powers of attorney be registered with the Register of Deeds: Powers of Attorney Act 1934 (Tas) s 6. The suggestion made by the Tasmanian Law Reform Commission that EPAs be registered at the Supreme Court was not accepted.
30. Powers of Attorney Act 1980 (NT) s 13(c).
31. Powers of Attorney Act 1934 (Tas) s 6.

The Northern Territory Public Trustee, who had experience of the Northern Territory scheme, said that the numbers who registered powers was low. People either did not go to the trouble of registering, or, where the power was registered, third parties failed to check the register. He regarded the requirements as a waste of time and resources. This accords with experience elsewhere,[32] except with regard to the well- established requirement for the registration of powers of attorney when dealing with real property.[33]

The reluctance of people to comply with registration requirements creates considerable risks for an incompetent principal. As the Ontario Law Reform Commission put it: "[W]e are reluctant to see the power irrevocably invalidated by failure to file. The chief reason for our reluctance is our desire not to frustrate the expressed intention of the donor".[34] The most telling argument, however, is that those jurisdictions which rejected registration, where EPA schemes have been working, (in some cases for nearly a decade[35]), have not legislated to provide for this additional safeguard. Such schemes appear to be working satisfactorily without. In the case of EPAs, therefore, law reform commission reports have specifically recommended against registration for purposes[36] other than real estate transactions.

32. Formerly registration of ordinary powers of attorney was required in Victoria but the practice has now been abandoned: Instruments Act 1958 (Vic) s 105 (repealed by Instruments (Powers of Attorney) Act 1980 (Vic) s 2).
33. Real Property Act 1900 (NSW) ss 36(1C), 36(3), 39(1A); Conveyancing Act 1919 (NSW) ss 158(4), 163(1) and (2); Instruments Act 1958 (Vic) ss 115, 117 (now repealed but preserved by the Instruments Act 1958 s 105(2) for powers created before 1 July 1980 - powers of attorney created after 1 July 1980 are not required to be registered); Powers of Attorney Act 1934 (Tas) ss 6-7; Registration of Deeds Act 1935 (Tas) ss 4, 6; Property Law Act 1974-1990 (Qld) s 171; Real Property Act 1861-1989 (Qld) s 104, Sch L; Real Property Act 1886 (SA) s 156; Registration of Deeds Act 1935 (SA) ss 10, 34; Transfer of Land Act 1893 (WA) s 143; Registration of Deeds Act 1856 (WA) ss 2-3; Real Property Act 1886 (NT) s 156; Powers of Attorney Act 1980 (NT) s 8; Powers of Attorney Act 1956 (ACT) s 11; Real Property Act 1925 (ACT) s 130; Registration of Deeds Act 1957 (ACT) s 4.
34. Ontario Law Reform Commission supra n 8, 26.
35. Eg, Manitoba and Ontario.
36. Law Reform Committee of South Australia supra n 8, 4; New South Wales Law Reform Commission supra n 8, para 6.3; Queensland Law Reform Commission supra n 8, 43; ALRC 47 supra n 13, paras 29-30.

2. The Australian Law Reform Commission Scheme

The Australian Law Reform Commission, for those reasons, suggested less onerous protective mechanisms in its scheme for the Australian Capital Territory.[37] It opted for greater emphasis on defining and explaining the standards of behaviour of attorneys in the legislation and explanatory notes.[38] It also suggested that the Public Trustee in the first instance (rather than the Court of Protection, as in England, or its equivalent, the Supreme Court in the Australian Capital Territory) be given an advisory and supervisory role.[39] Thus it recommended that the Public Trustee be empowered to call for accounts from the attorney, be able to apply to the Australian Capital Territory Magistrates' Court for orders directing the attorney to comply with such a request or for orders to remedy any mismanagement, and, if necessary, for an order to terminate the EPA.[40] As a further protection, it suggested that any concerned person, with the leave of the Court, could request that the Court exercise these supervisory powers.[41] Those recommendations have been implemented in sections 12, 15, 16 and the Schedule of the Australian Capital Territory Powers of Attorney (Amendment) Act 1989.

There are several other protective measures suggested by the Australian Law Reform Commission which are of significance.

(i) Capacity Required of Principal for Execution of EPA

Traditionally the commonly accepted test for the capacity required of a principal who wished to execute an EPA was the ability to understand the consequences of entering into a power of attorney.[42] That was not accepted as the test, however, in the recent New South Wales case, *Ranclaud v*

37. ALRC 47 supra n 13, para 30.
38. That proposal has been included in suggestions for improvements to Victorian and Alberta EPAs: Law Reform Commission of Victoria supra n 8, 12; Alberta Law Reform Institute supra n 8, 48. Notes are also required in New Zealand: Protection of Personal and Property Rights Act 1988 (NZ) s 95, Sch 3; and Northern Ireland: Enduring Power of Attorney Regulations 1989 (N Ir), SI 1989/64.
39. ALRC 47 supra n 13, para 30.
40. It also recommended that the ACT Supreme Court should have concurrent jurisdiction so that when termination of the EPA was ordered the appointment of a guardian or property manager could also be effected: ALRC 47 supra n 13, paras 38-39. At present the guardianship jurisdiction is solely vested in the Supreme Court: Lunacy Act 1898 (NSW) (as it applies in the ACT) Pts VII and VIII.
41. ALRC 47 supra n 13, para 38.
42. *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* (1904) 1 CLR 243; *Gibbons v Wright* (1954) 91 CLR 423.

Cabban.[43] The New South Wales Supreme Court (Justice Young) suggested that to execute an ordinary power of attorney the principal must not only be able to understand what a power was and what in a general sense it could be used for, but also must have sufficient understanding to comprehend all the activities that the attorney might undertake when using the power. In other words, the court adopted a more restrictive test than had hitherto been accepted.

The traditional test was recently reiterated in the English case of *Re K*.[44] In that case, which concerned the test for capacity to execute an EPA, Justice Hoffman in the Court of Protection held that at the time of execution the principal did not have to be capable of understanding all the things an attorney was authorised to do. Rather it was sufficient if it could be said that the principal understood that:

1. the attorney would be able to assume complete authority over the principal's affairs, subject to any limitation in the power itself;
2. the attorney would be able to do anything with the principal's property which the latter could have done;
3. the attorney's authority would continue after the principal became incapacitated; and
4. the power would become effectively irrevocable once the principal had become incapacitated.[45]

Because of the doubts raised by *Ranclaud v Cabban*, the Australian Law Reform Commission recommended that amendments to the Australian Capital Territory legislation should spell out the test in *Re K* as the standard.[46] That recommendation was accepted.[47] The adoption of the less stringent test will enable a greater number of principals who might not qualify under the more onerous standard to execute an EPA and thus make their own arrangements to manage their affairs if they become incapable. The new Queensland EPA provisions do not include an equivalent section but the same test is stated in the Second Schedule to the Act.[48]

43. (1988) NSW ConvR ¶ 55-385, 57,548 (Young J). Note that the Law Reform Commission of Victoria doubted that the test in *Ranclaud v Cabban* was in fact different: supra n 8, 4.
44. [1988] 1 All ER 358.
45. Ibid, 363.
46. ALRC 47 supra n 13, para 20 and Appendix A cl 3A.
47. Powers of Attorney (Amendment) Act 1989 (ACT) s 3A.
48. Property Law Act 1974-1990 (Qld) Sch 2, Form 16A. The Alberta Law Reform Institute has also suggested that any enduring powers legislation for the Province include a provision rendering void any EPA signed by a principal who could not understand its nature and effect: supra n 8, 59.

(ii) Duties of Attorneys

When operating under an ordinary power the standard of care imposed on an attorney varies according to whether the attorney is being paid and the nature of the task. Where the attorney is operating in a voluntary capacity there is no obligation to act at all.[49] If an unpaid attorney chooses to perform functions under the power, the standard is not that of reasonable care but only such skill as the attorney possesses.[50] Those rules are, however, subject to the laws which apply to fiduciary relationships. Thus where the attorney deals with the principal's money or property, the attorney attracts fiduciary duties such as the need to account, to avoid conflicts of interest and to keep the principal's property separate from the attorney's own.[51]

Since many EPAs, if not most, will appoint family members as attorneys and such attorneys will not be receiving any remuneration for so acting, the rules above, if unmodified, would apply to them. That would create a most unsatisfactory situation in the case of an incapable principal since there would be no obligation on the attorney to act on the principal's behalf at a time when the principal was no longer capable of making other arrangements.

The Australian Law Reform Commission rejected the suggestion that trusteeship obligations, with the elaborate rules those entail, should be imposed on attorneys as a way of forcing them to act.[52] It opted instead for two approaches. First, rather than imposing a statutory obligation to act,[53] it recommended that the obligations of an attorney be spelt out in the explanatory notes accompanying the prescribed form and that a declaration must be made by the attorney at the time of execution to the effect that he or she is willing to undertake the responsibilities set out in the notes. Those less onerous obligations are also reflected in the acceptance by the Commission that where, for example, a spouse is the attorney, mixing of money and property should be permitted and that there will be situations where the attorney should be permitted to spend moneys of the principal on him or herself.[54] Both practices are incompatible with usual fiduciary or trusteeship

49. F M B Reynolds *Bowstead on Agency* 15th edn (London: Sweet & Maxwell, 1985) 137.
50. *Wilson v Brett* (1843) 11 M & W 113; 152 ER 737.
51. P D Finn *Fiduciary Obligations* (Sydney: Law Book Co, 1977) 201-205.
52. ALRC 47 supra n 13 para 32. Compare with Powers of Attorney Act 1934 (Tas) s 11C(1).
53. Eg, Property Law Act Amendment Act 1990 (Qld) s 175H; Powers of Attorney and Agency Act 1984 (SA) s 7; Powers of Attorney Act 1934 (Tas) s 11C.
54. ALRC 47 supra n 13 para 32, Appendix A. Sch cl 9; para 36.

standards. Those sensible suggestions have been implemented in both the Australian Capital Territory and Queensland.[55]

Secondly, it has suggested that the substituted judgement principle be imported from guardianship law to guide an EPA attorney in making decisions.[56] The substituted judgement standard requires the principal to act, so far as possible, in the way the principal would have done.[57] Thus, for example, the attorney would be expected to continue to make payments which would sustain the standard of living in the principal's household at its customary level even if, to the attorney, that might be extravagant. Similarly, the attorney would be required to respect the principal's wishes as to dietary habits even though the attorney might consider these to be faddish. The emphasis under substituted judgement is on respecting the wishes and thus promoting the autonomy of the principal. The agent operating under this principle becomes, in a real sense, the alter ego of the principal.

The alternative and more traditional best interests standard requires the attorney to act as a reasonable person would have done.[58] Historically that standard had as its focus the preservation of the principal's property for the benefit of family members and beneficiaries.[59] In modern dress its focus is on a paternalistic concern for the principal's welfare as judged by the attorney. The new emphasis on management of personal affairs under EPAs and the recognition that the principal's wishes should be respected, where possible, has led the Commission to reject this standard in other than exceptional circumstances.[60]

It has conceded, however, that the substituted judgement principle may need to be modified either where the principal's wishes have not been expressed or are not able to be gauged (for example, in relation to some form of potentially invasive medical treatment, the need for which had not been contemplated prior to the principal's incapacity) or where adherence to the principal's wishes would leave the principal destitute.[61] These exceptions

55. ALRC 47 supra n 13 para 31; Powers of Attorney (Amendment) Act 1989 (ACT) s 14(4); Property Law Act Amendment Act 1990 (Qld) s 175E(2).
56. ALRC 47 supra n 13, paras 33-36.
57. *Ex parte Whitbread* (1816) 2 Mer 99; 35 ER 878; *In re Whitaker* (1889) 42 Ch D 119; *Re DJR and the Mental Health Act 1958* [1983] 1 NSWLR 557, 564-565.
58. ALRC 47 supra n 13, paras 33-34.
59. Sir H S Theobald KC *The Law Relating to Lunacy* (London: Stevens and Sons, 1924) 365.
60. ALRC 47 supra n 13, para 36. The hybrid standard is also to be found in some guardianship legislation. See Guardianship and Administration Board Act 1986 (Vic) s 28; Adult Guardianship Act 1988 (NT) s 4(a).
61. ALRC 47 supra n 13, para 36.

aside, the requirement that agents operate according to the substituted judgement standard is a welcome recognition that the principal's wishes should be respected wherever possible.

(iii) Execution Formalities

Australian practice varies considerably. That reflects the tension between the need to have a cheap, simple, easy to use device while at the same time protecting principals who may be becoming confused when they make an enduring power, or be suggestible or vulnerable to family pressure. In New South Wales and Queensland the principal's signature must be witnessed by a person with legal qualifications. Alternatively, a justice of the peace may witness the signature in Queensland[62] and in South Australia the person must be someone authorised to take affidavits.[63] The most common requirement, however, is that it be witnessed by two people (only one in the Northern Territory[64]) other than the attorney.[65] In addition, in Tasmania and the Northern Territory, the witnesses must not be a near relative of the attorney or, in Tasmania, the principal.

Provisions requiring witnesses to be legal practitioners or legal officials or prohibiting them being related to parties to the transaction reflect concern about elderly relatives being pressured into completing an EPA in favour of a member of the family or a carer. Each approach has its supporters. The advantage of the first is that it provides for independent witnesses without increasing the practical difficulties of drawing up the EPA. Use of lawyers or legal officials may give increased protection to the principal but this is at the expense of the administrative simplicity which is seen as one of the principal advantages of EPAs. The requirement for independent legal advice was rejected in the recent Victorian Law Reform Commission Discussion Paper on EPAs because of the increased costs involved.[66] Use of justices of the

62. In NSW the witnesses include a clerk of petty session, a barrister or solicitor: Conveyancing Act 1919 (NSW) s163F(2)(b) and Conveyancing Act Regulations 1961 (NSW) s 33B. In Qld the witness must be a justice of the peace or a legal practitioner: Property Law Act Amendment Act 1990 (Qld) s 175A(a)(ii). The Queensland scheme was not in force at the time the Law Reform Commission was preparing its Report.
63. Powers of Attorney and Agency Act 1984 (SA) s 6(2)(a).
64. Powers of Attorney Act 1980 (NT) s 14.
65. Powers of Attorney Act 1956 (ACT) s 12(1)(b); Powers of Attorney Act 1934 (Tas) s 11A(2)(a); Instruments Act 1958 (Vic) s 115.
66. Law Reform Commission of Victoria *Enduring Powers of Attorney* supra n 8, 6. The opposite position was adopted in the Alberta Discussion Paper: Alberta Law Reform Institute supra n 8, 45-46.

peace (as in Queensland) or commissioners of affidavits (as in South Australia) avoids any untoward expense but if those officials are not easily available, as for example, in nursing homes, that degree of formality may have the unfortunate effect of inhibiting use of EPAs.

The Australian Law Reform Commission opted for a middle course. It recommended that there be two witnesses, neither of whom is the attorney and, mindful of the need to avoid the principal being subjected to pressure from family members to create an EPA, it suggested that the witnesses also must not be a close relative of the attorney or the principal.[67] Those recommendations have been implemented.[68]

Other execution formalities suggested by the Australian Law Reform Commission include the almost universal requirement that the document must contain a statement by the attorney that he or she has accepted the appointment[69] and, in more recent legislation, the additional requirement of explanatory notes in "plain English". That is a welcome addition since it enables the duties of the attorney to be set out in language which is easily comprehensible.[70] In those jurisdictions which opt for standard forms and explanatory notes, the notes should be reproduced in the languages in most common use in the jurisdiction. That practice, to date, has apparently not been adopted in any State or Territory.

(iv) Termination of EPAs

The normal provisions relating to termination of an ordinary power apply to EPAs. Thus a power will come to an end if the principal revokes it or dies; or if the attorney becomes bankrupt, mentally incompetent or dies; or, if the attorney is a company, the company is wound up. A statement of those principles is included in the Queensland and Northern Territory Acts.[71] The major difficulty, however, arises if the attorney wishes to renounce the

67. ALRC 47 supra n 13, para 25.
68. Powers of Attorney Act 1956 (ACT) s 12(1)(b).
69. Ibid, s 12(1)(c); Powers of Attorney Act 1980 (NT) s 13(b), Sch 1; Property Law Act 1974-1990 (Qld) s 175A(a)(iii); Powers of Attorney and Agency Act 1984 (SA) s 6(2)(b), Sch 2; Powers of Attorney Act 1934 (Tas) s 11A(2)(b), Sch 1.
70. Powers of Attorney Act 1956 (ACT) s 12, Sch; Property Law Act 1974-1990 (Qld) s 175A, Sch 2, Form 16A. See also Enduring Powers of Attorney Act 1985 (UK) s 2; Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (UK); Protection of Personal and Property Rights Act 1988 (NZ) s 95, Sch 3. This notion has also been approved by the Law Reform Commission of Victoria (supra n 8, 12) and the Alberta Law Reform Institute (supra n 8, 47-51).
71. Powers of Attorney Act 1980 (NT) ss 16-17; Property Law Act 1974-1990 (Qld) s 175C.

attorneyship after the principal has become incompetent and consequently is unable to appoint a substitute attorney. To avoid that problem, several jurisdictions specifically prohibit the attorney from renouncing without the sanction of the court.[72]

The Australian Law Reform Commission recognised that attorneys could not be coerced to continue to act if they were unwilling. Hence it refused to recommend that the attorney be prohibited from resigning, at least without court approval, or that there be sanctions for failing to act. Neither did it suggest that the attorney had to accept onerous conditions, such as advising Supreme Court officials, before renunciation. That approach appears sensible given that the agent will frequently be a member of the principal's family acting in a voluntary capacity and given that the policy of the law should be to encourage domestic arrangements of this kind. The recommendation was that, in order to deter people from undertaking the role without a proper appreciation of the responsibilities involved, the notes should warn potential agents of the disadvantages to an incompetent principal if the agent resigns after the principal has become incompetent. When an attorney is committed to renouncing the attorneyship, the Commission recommended that the notes state that the agent should advise a solicitor or the Public Trustee.[73] That recommendation was adopted.[74]

A related issue is whether the power should be revoked if a management of property order is made. Practices vary. Some jurisdictions provide that the EPA continues and any formal protective management order only operates in relation to property[75] not subject to the EPA.[76] The statutes also validate acts of the manager[77] undertaken before the person was aware that an EPA was in existence. In other jurisdictions the power is revoked to the extent that it overlaps with the management order.[78] Perhaps the most theoretically

72. Powers of Attorney Act 1980 (NT) s 15(1); Powers of Attorney and Agency Act 1984 (SA) s 9; Property Law Act 1974-1990 (Qld) s 175C(2)(a).
73. ALRC 47 supra n 13, para 41.
74. Powers of Attorney Act 1956 (ACT) ss 12, 17(2), Sch, Part D.
75. Apart from the ACT (and to a limited extent, Victoria) where EPA attorneys may be given personal or guardianship powers, EPAs in Australia only apply to management of property and finances: Powers of Attorney Act 1956 (ACT) s 13. There is a proposal in Western Australia that, as in Victoria, there should be legislation permitting agents under an EPA to refuse consent to medical treatment: Law Reform Commission of Western Australia *Report on Medical Treatment for the Dying* (Project No 84 1991) paras 1.27, 2.13-2.14, Ch 6.
76. Powers of Attorney Act 1934 (Tas) s 11D(1); Instruments Act 1958 (Vic) s 117(1), (3).
77. Powers of Attorney Act 1934 (Tas) s 11D(2); Instruments Act 1958 (Vic) s 117(2), (4).
78. Powers of Attorney Act 1980 (NT) s 18.

satisfying solution is in force in South Australia where it is provided that the attorney, on appointment of a property manager, becomes accountable to that person.[79] In every jurisdiction an EPA can be revoked by court order or by order of a guardianship and administration tribunal.[80]

The Australian Law Reform Commission declined to make recommendations on this issue because it considered it more appropriate to do so in its subsequent reference on guardianship and management of property legislation for the Territory.[81] It did, however, canvass several options. One of these was that the body making a guardianship or management of property order could, if appropriate, choose the attorney as guardian[82] or manager.[83] In its later Report on guardianship and management of property the Commission simply recommended that if an EPA exists at the time a guardianship or management of property order is made, the body which decides the terms of the order should have a discretion as to which of these options to choose.[84] In the continuing absence of replacement legislation for the New South Wales Lunacy Act 1898 (the archaic guardianship and management of property legislation in the Territory) it is not yet possible to see what approach will be taken.

3. The Western Australian Scheme

As suggested earlier, the Western Australian drafters and advisers, in devising the latest Australian EPA legislation, have been able to adopt and, in some instances, to develop ideas from other jurisdictions. Their signal achievement is to have provided the most theoretically satisfying link to date between guardianship and administration provisions in an EPA scheme. It is no accident that the new Western Australian EPA legislation, alone amongst Australian EPA Acts, is found in the Western Australian Guardianship and

79. Powers of Attorney and Agency Act 1984 (SA) s 10.
80. Powers of Attorney Act 1956 (ACT) s 17(1)(c); Conveyancing Act 1919 (NSW) s 163G(2)(b); Powers of Attorney Act 1980 (NT) s 15(2)(c), (3), (4); Property Law Act 1974-1990 (Qld) s 175C(2)(e); Powers of Attorney and Agency Act 1984 (SA) s 11(1)(c); Powers of Attorney Act 1934 (Tas) s 11E(1)(c); Instruments Act 1958 (Vic) s 118.
81. Guardianship and management of property in the Australian Capital Territory is governed by the Lunacy Act 1898 (NSW) (as it applies in the ACT).
82. The Australian Capital Territory EPA legislation, following the recommendations of the Law Reform Commission, permits an EPA attorney to be given guardianship powers: Powers of Attorney Act 1956 (ACT) s 13.
83. ALRC 47 supra n 13, para 42.
84. Law Reform Commission - Australia *Guardianship and Management of Property* (Report No 52 1989) paras 4.76-4.77.

Administration Act 1990 ("the Act").[85] It has thus made it possible to achieve what one writer described as the principal desire of many people, namely, to be able to choose the person(s) who will administer their estate on mental incapacity as they do on death.[86] The approaches adopted in the Act to the principal issues raised by the Australian Law Reform Commission will be looked at in turn.

(i) Public Notification

There is no requirement for registration of EPAs in Western Australia. That apparently does not preclude the need to register EPAs used for real estate transactions. A concession has been made in that the Act states that a valid EPA is deemed to be in the form required for registration under section 143 and Schedule 19 of the Transfer of Land Act 1893.[87]

(ii) Standard Form

The EPA is required to be in, or substantially in, the prescribed form for EPAs set out in Form 1, Schedule 3 of the Act.[88] The degree of flexibility permitted by the "substantially in" wording of the provision is useful for practitioners who wish to draw up EPA forms which contain additions or variations to the legislative model. It might also encourage an enterprising solicitor to draw up a form containing explanatory and educative notes. Their absence from Form 1 is one of the most disappointing aspects of the Western Australian scheme.

(iii) Controls on Attorney

As with most other schemes the Guardianship and Administration Act has provided that an agent is able to call for advice. In Western Australia, the advice is tendered by the Guardianship and Administration Board.[89] That is the body which may call for accounts[90] and, if necessary, require that they be audited.[91] It may also suggest that the terms of the EPA be varied or the EPA revoked. That provision also includes the power to appoint a substitute attorney.[92]

85. Guardianship and Administration Act 1990 (WA) Pt 9.
86. Farrand supra n 18, 640.
87. Guardianship and Administration Act 1990 (WA) s 103(2).
88. Ibid, s 104(1)(a).
89. Ibid, s 109(2)(b).
90. Ibid, s 109(1)(a).
91. Ibid, s 109(1)(b).
92. Ibid, s 109(1)(c).

(iv) Capacity Required of Principal for Execution of EPA

Despite the apparent conflict about the common law test for competence, the Western Australian Act has not dealt with this question. Although the Victorian Law Reform Commission, in the most recent discussion of the topic, expressed doubt as to whether there was a difference between the tests in *Ranclaud v Cabban*[93] and *Re K*,[94] it acknowledged that uncertainty remained and proposed, in its Discussion Paper, that the test should be set out in EPA legislation.[95] It is perhaps unfortunate that in Western Australia the opportunity was not taken to clarify the matter.

(v) Duties of Attorneys

The Western Australian provisions have imposed a standard on EPA attorneys, namely, to act with reasonable diligence.[96] That is certainly a higher standard than is imposed by the common law on voluntary agents, and is welcome. It has not, however, adopted the substituted judgement or modified substituted judgement principle[97] which would require that decision-making by attorneys should be as near as possible to that of the principal. There is also a requirement that the attorney keep accurate records and accounts, a provision which is now standard in most EPA legislation. It is enforced by a considerable penalty, $2 000.[98] In other cases the only sanction for an attorney's dereliction of duty is to compensate the principal for loss arising from the failure.[99]

(vi) Execution Formalities

There must be two witnesses for an EPA, both of whom are "authorised to take declarations."[100] The use of such officials entails a loss of privacy and instils a degree of formality which is absent in the case of ordinary powers. Further, unlike the position in Queensland where justices of the peace abound, it does not appear[101] that such officials are readily available in the

93. Supra n 43.
94. Supra n 44.
95. Law Reform Commission of Victoria *Enduring Powers of Attorney* supra n 8, paras 3-5.
96. Guardianship and Administration Act 1990 (WA) s 107(a).
97. ALRC 47 supra n 13, para 35.
98. Guardianship and Administration Act 1990 (WA) s 107(b).
99. Ibid, s 107(a).
100. Ibid, s 104(2)(a).
101. Telecom Australia *Telecom Yellow Pages Perth 1991* under "Justices of the Peace" and "Commissioners for Affidavits".

State, particularly for people with mobility problems such as residents of nursing homes. That creates a barrier to the use of EPAs which is unfortunate. Although it may be unlikely that many commissioners of declarations will be related to principals or attorneys, a prohibition on them being witnesses when a familial relationship exists should have been included. The attorney must complete a form of acceptance.[102] The absence from the standard form of explanatory notes for principals, witnesses and attorneys, is, as was mentioned earlier, disappointing.

(vii) Termination of EPAs

The appointment of a manager by the Guardianship and Administration Board does not automatically terminate an EPA. The provisions ensure that the attorney may continue to act where there is no inconsistency between the roles of manager and agent.[103] The legislation adopts the sensible South Australian solution of making the attorney formally accountable to the manager.[104] It is unfortunate that the Act has not also specifically acknowledged the possibility that the attorney may be appointed as manager. The absence of the provision does not necessarily mean that the Board, in its discretion, could not choose the attorney. However, given that the attorney has been appointed, presumably because the attorney is trusted by the principal, a positive statement that the attorney is eligible to act as manager would better have reflected a policy of respect for the principal's intentions. The absence of the statement is inconsistent with other provisions recognising the potential for the attorney to act as manager.[105]

Termination following the attorney's renunciation of authority is addressed. Any person with a proper interest, which would include the attorney, may apply to the Guardianship and Administration Board for an order requesting that the EPA be terminated and, if appropriate, a substitute attorney appointed.[106]

102. Guardianship and Administration Act 1990 (WA) s 104(1)(a), Sch 3, Form 2.
103. Ibid, s 108(1).
104. Ibid, s 108(2).
105. See text accompanying nn 107-109 infra.
106. Guardianship and Administration Act 1990 (WA) ss 109(2), 109(1)(c).

(viii) Relationship Between Guardianship and Administration Board and Attorney

As mentioned earlier, a unique feature of the Western Australian legislation is that it clearly recognises the possibility that an attorney can be appointed as property manager. Thus at execution the principal must choose whether the EPA is to operate immediately from a date set by the principal or from the time when the principal has become mentally incompetent (the normal patterns), or whether it is to commence only when a formal declaration of incompetency is made by the Guardianship and Administration Board.[107] If the latter choice is made, the EPA becomes, in effect, a form of management order. The difference from a normal management of property order is that the principal has nominated in advance who should be manager. The legislative recognition of this possibility clearly respects the principal's wishes and avoids the appointment of a stranger or someone who would not have been chosen by the principal as protective manager.

The other advantage of this procedure is that it provides a mechanism for determining the often difficult and sensitive issue of the point at which the principal has become incompetent and the legal necessity for a substitute decision-maker has arisen. The disadvantage is that before determining the issue the principal and the principal's nearest relative, as a minimum, must receive notice of the hearing, a move which may distress the individuals concerned.[108]

For reasons of space it is not proposed to explore the definition of incompetency used in the Act[109] but it should be noted that an inability to make "reasonable judgements" about affairs is a test which embodies paternalistic notions rather than adopting a philosophy of respecting individuals' autonomy.

107. Ibid, ss 104(1)(b), 106.
108. Ibid, ss 106(4), 106(1), 41(1), 41(3).
109. Ibid, ss 64(4), 106(2)(b).

II. EPA: ATTORNEY AND GUARDIANSHIP POWERS

The second and more radical of the proposed changes suggested by the Australian Law Reform Commission is the recommendation that EPAs be used for decision-making on matters of a personal nature. In other words, an EPA attorney should be clothed with a guardian's authority. Anecdotal evidence suggests that there are attorneys who assume that a power of attorney, if expressed in general terms, does indeed give them complete decision-making authority over a principal's affairs. The standard short-form power states simply: "I authorise my attorney(s) to do on my behalf anything that I can lawfully do by an attorney".[110] The failure to specify what an attorney's powers are makes that assumption understandable. Given such a belief, there is a need to protect attorneys from making decisions for which they have no authority and that can be achieved by giving them the authority they assume they already possess.

Another commonsense reason for giving attorneys guardianship powers is that it is frequently impossible to distinguish between personal and business matters. Thus as the Public Advocate for Victoria put it in a submission to the Law Reform Commission: "[M]oney decides the quality of nursing home care, cosmetic operations have to be paid for, and even little things like visiting hairdressers boil down to money".[111] Those are sound practical reasons for giving the attorney powers over both financial and non-business affairs.

Whether an ordinary power of attorney can be used for decisions of a personal nature is, at law, unclear. English writers,[112] discussing what functions can be exercised by an attorney operating under a general power, have concluded that making a will, marrying, sitting an exam - in other words, acts which require the personal skill and judgement of the actor - are not included.[113] Those are all matters which would be classified as personal, not business, in nature. Their specific exclusion suggests that other matters of a personal nature which are not dependent to the same extent on individual judgement, *are* powers which an attorney may be granted.[114] By contrast,

110. Eg, ibid, Sch 3.
111. ALRC 47 supra n 13, para 45.
112. Eg, J F Josling *Powers of Attorney* 4th edn (London: Oyez Publishing, 1976).
113. Ibid, 12-13. Unfortunately he gives no authority for this proposition.
114. This is an assumption which appears to have been shared by the Law Reform Commission of Western Australia. See its *Discussion Paper on Medical Treatment for the Dying* (Project No 84 1988) paras 3.15, 3.17, 3.18, 6.1(5).

Brian Porter and Mark Robinson of the New South Wales Protective Office state that "[c]ontrary to popular notion, a power of attorney does not give to the attorney any power to make 'personal life' decisions on behalf of the principal...."[115]

In the uncertain state of the law the matter needs to be clarified. The Australian Law Reform Commission has, therefore, recommended that an attorney should be given powers over personal affairs if the principal so wishes.[116] It suggested that a separate part of the prescribed EPA form be completed by a principal who intends to give an agent that authority.[117] It also recommended that the attorney's powers over personal affairs should not commence until the principal has become incompetent even though for other purposes the attorney may commence to use the power upon execution. The reason is that the need for guardianship powers only arises if the principal becomes incapacitated. Those recommendations have been implemented in the EPA legislation of the Australian Capital Territory.[118]

The recommendation that attorneys be granted guardianship powers has some unfortunate effects. Guardianship powers are commonly described as including all the powers a parent[119] has over a young child. That includes the power of punishment, a power which is demeaning in the context of adults and which therefore needs to be specifically excluded from the authority which may be exercised by an attorney. Unfortunately that recommendation was not accepted.

A. Consent to Medical Treatment

Perhaps the more important consequence of giving an attorney guardianship powers is that it permits the attorney to consent to medical treatment. That was the most controversial of the Australian Law Reform Commission's recommendations; not because it permitted substituted consent to medical treatment per se (that is a well recognised authority of someone with guardianship powers), but because it had the potential to permit third party consent to such sensitive treatments as sterilisation, chemotherapy and the removal of life-support systems. To date only one other jurisdiction, Victoria, has introduced legislation which permits an agent to consent to medical

115. B Porter and M Robinson *Protected Persons and Their Property in New South Wales* (Sydney: Law Book, 1987) 86. Again no authority is given for this suggestion.
116. ALRC 47 supra n 13, para 48.
117. Ibid, para 50.
118. Powers of Attorney (Amendment) Act 1989 (ACT) s 13.
119. Eg, Guardianship and Administration Board Act 1986 (Vic) s 24(1).

treatment[120] and then only for a limited purpose, namely, to refuse treatment.[121] The two latest law reform commission discussions on enduring powers in common law countries[122] and the most recent Australian legislation[123] have not suggested or provided for such broad authority to be given to agents under enduring powers.[124] Guardianship powers, presumably including the authority to consent to medical treatment, may be given to agents in New Zealand.[125]

To date there has been nothing to indicate that abuses have occurred under EPAs in the Australian Capital Territory in which authority has been given to the agent to consent to medical treatment. Since its scheme has been operating only since the beginning of 1990, perhaps it is too early to assess the impact of the provision. On the other hand the safeguards built into the scheme may prevent abuses from occurring.

The Australian Law Reform Commission recommended, as with guardianship powers, that the principal must execute a separate part of the EPA form if the power to consent to medical treatment is to be granted to an attorney.[126] Secondly, if principals want to exclude certain treatments they may do so. Thirdly, the consent which may be given must be lawful. Thus, for example, it must comply with requirements such as those relating to tissue donation under the Australian Capital Territory Transplantation and Anatomy Act 1978.[127] Fourthly, as with guardianship powers, the notes explain that the attorney's powers will only commence once the principal has become incapacitated.[128]

120. Medical Treatment (Enduring Power of Attorney) Act 1990 (Vic) (amending the Medical Treatment Act 1988 (Vic)). However, the Law Reform Commission of Western Australia has recommended that Western Australia introduce similar legislation in its *Report on Medical Treatment for the Dying* supra n 75.
121. Treatment may be refused by the agent in circumstances where the principal is incompetent and the treatment would cause "unreasonable distress" or there are reasonable grounds for believing that the principal would have refused such treatment: Medical Treatment Act 1988 (Vic) s 5B(2).
122. Alberta Law Reform Institute supra n 8; Law Reform Commission of Victoria supra n 8.
123. Property Law Act Amendment Act 1990 (Qld).
124. Indeed the Medical Treatment (Enduring Power of Attorney) Act 1990 (Vic) s 11 specifically states that an ordinary EPA in that State does not authorise the attorney to make decisions about medical treatment: Instruments Act 1958 (Vic) s 117(5).
125. Protection of Personal and Property Rights Act 1988 (NZ) ss 98-99.
126. ALRC 47 supra n 13, paras 50, 51, Appendix A Sch, cll 5-8.
127. Powers of Attorney (Amendment) Act 1989 (ACT) s 13(1)(b)(ii).
128. Ibid, Sch.

Finally, the Commission suggested that certain non-therapeutic procedures, such as sterilisation and abortion, be specifically excluded from the treatments to which the attorney can consent.[129] Consent to those procedures would need to be given, as at present, by the Australian Capital Territory Supreme Court under its inherent powers or, if the treatment was a form of psychosurgery which is specified in the Territory's Mental Health Act 1983, by the committee set up for that purpose under that Act.[130]

The Commission failed to address, at least directly, one of the more controversial issues in this area, namely, whether the power could be used to consent to the termination of life-support measures. As mentioned above, it recommended that in general the consent which an attorney was able to give only referred to "one which can lawfully be given".[131] Since there is doubt about the efficacy of surrogate consent[132] to refusal or termination of treatment of a life-supporting nature, the consequence is that a principal in the Australian Capital Territory would be unwise to use an EPA for such purposes.

Protective provisions in the legislation in relation to more controversial or sensitive treatments are similar to those included in modern Australian guardianship legislation, under which those kinds of treatment cannot be consented to by the guardian alone but must be the subject either of joint consent by the guardian and the body which determines guardianship applications, or of that body alone.[133]

1. The Western Australian Act

Despite the assumptions apparent in the Law Reform Commission of Western Australia's *Discussion Paper on the Medical Treatment for the Dying* that both EPAs and ordinary powers could be used for decision-making of a personal nature, including consent to treatment, the Western Australian legislation has not given EPA agents such powers. However, Western Australian EPA agents may yet be given the same limited powers available to EPA agents in Victoria, namely to refuse consent to medical treatment, if the recommendations in the *Report on Medical Treatment for the Dying* are accepted.[134]

129. ALRC 47 supra n 13, para 51.
130. Ibid.
131. Ibid.
132. Law Reform Commission of Western Australia supra n 114, paras 2.22-2.25.
133. Eg, Guardianship and Administration Board Act 1986 (Vic) ss 37-38; Disability Services and Adult Guardianship Act 1987 (NSW) Pt 5; Adult Guardianship Act 1988 (NT) s 21.
134. Law Reform Commission of Western Australia supra n 75, paras 1.27, 2.13, 2.14, Ch 6.

B. Portability of EPAs

One further issue which is particularly pressing but has not been addressed in any legislation to date, is the question of portability of EPAs.[135] It is common for EPAs to be given to family members who are not residing in the same State or Territory. The issue is whether the EPA should be in the form required by the jurisdiction in which the principal resides; the jurisdiction where all or most of the property is situated; or in the form required by the jurisdiction where the attorney resides. Should an EPA for all three be completed? That appears unnecessarily cumbersome. At present, given the variation in the formalities required in each State and Territory, the third option appears to be the safest solution.

The Law Reform Commission of Victoria suggested that "an enduring power which is valid under the law of a prescribed State or Territory is also valid in Victoria".[136] That, at least, is a step in the right direction. The Alberta Law Reform Institute suggested in relation to the Province that, in accordance with conflict of laws principles, an EPA from another jurisdiction should be recognised provided it complied with the legislative requirements in that other jurisdiction.[137]

In a submission made by the author, for the purposes of a joint meeting of Commonwealth, State and Territory Attorneys-General, it was suggested that the Attorneys-General should draw up a list of core provisions which would be regarded as the minimum protective formalities. Any EPA which complied with those formalities would then be recognised throughout Australia. The advantages are that minimum safeguards would be implemented in every jurisdiction and those States and Territories which at present do not comply would have to tighten their legislation.

These provisions should be:

(a) acceptance of the common law test for capacity of the principal to execute the EPA;
(b) two witnesses not related to either party;
(c) a statement by the principal that the EPA is to survive the principal's incapacity;

135. The matter, however, has been raised by Law Reform Commissions. Eg, Law Reform Commission of Western Australia supra n 114, para 3.19(4); Law Reform Commission of Victoria *Enduring Powers of Attorney* supra n 8, Ch 9.
136. Law Reform Commission of Victoria *Enduring Powers of Management* supra n 8, 6.
137. Alberta Law Reform Institute supra n 8, 52-54.

(d) machinery whereby the EPA can be terminated or supervised by a court or some other official body;
(e) no renunciation of authority by the attorney without notification to some official body such as a court, the Public Trustee or a guardianship board or tribunal;
(f) broad standing provisions for objections to an EPA; and
(g) a requirement that attorneys keep records which they may be called upon at any time to produce to a court or official, a requirement which is spelt out in notes accompanying the EPA.

At present the statement of the test for capacity is found only in the Australian Capital Territory legislation[138] - execution formalities would need to be amended in the Northern Territory, Victoria and Western Australia. Only Victoria is caught by the statement of intention requirement; all jurisdictions already comply with the machinery provisions. The Australian Capital Territory, New South Wales, Tasmania and Victoria would need to amend their statutes to comply with the renunciation requirements and all jurisdictions except New South Wales already have sufficiently broad standing rules,[139] but Victoria and New South Wales would need to introduce the specific keeping of accounts provision.[140]

III. CONCLUSION

It is apparent from this survey of some recent developments in the law as to powers of attorney that this commonplace tool has been refurbished. It is hardly recognisable under its new guise of the enduring power, complete with additional safeguards and with its potential role of informal guardian as well as business manager. If this latter move is successful it should legitimise roles already undertaken by many in the community. It should also take some of the pressure off guardianship and administration tribunals or boards who are currently facing a considerable increase in their workload, due principally to the growth in the number of older people in the community. It is hoped that

138. Powers of Attorney Act 1956 (ACT) s 3A.
139. Instruments Act 1958 (Vic) s 118; Conveyancing Act 1919 (NSW) ss 163G, 163H. Compare with: Powers of Attorney Act 1956 (ACT) s 15(1); Powers of Attorney Act 1980 (NT) s 15(2); Property Law Act 1974-1990 (Qld) ss 175F, 175G; Powers of Attorney and Agency Act 1984 (SA) s 11(1); Powers of Attorney Act 1934 (Tas) s 11E(1).
140. Powers of Attorney Act 1956 (ACT) ss 14(3)(c),(4), 16, 17(1)(b); Powers of Attorney Act 1980 (NT) ss 11, 15(2); Property Law Act 1974-1990 (Qld) ss 175D, 175F, 175G; Powers of Attorney and Agency Act 1984 (SA) ss 8, 11 (1)(a), (b); Powers of Attorney Act 1934 (Tas) s 11E(1)(a),(b).

the informal but monitored system of substitute decision-making and management available under the EPA will encourage family members and friends of principals or potential principals, who might have been inhibited by the more demanding processes involved in guardianship and management of property applications, to undertake the formal care of the principal if that person becomes incapable. If that is achieved it will be apparent that in its new guise the power of attorney is fulfilling a social role which reflects the needs of the times.