

ENDURING POWERS OF ATTORNEY: WITH LIMITED REMEDIES – IT’S TIME TO FACE THE FACTS!

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ABSTRACT

Financial exploitation of older Australians by enduring attorneys is a serious and pervasive problem,¹ with the informal nature of the enduring appointment and lack of regulation leaving the elderly susceptible to financial abuse. Over the past two decades, increasing levels of dementia and rising incapacity has focussed the attention on the adequacy of enduring powers of attorney (EPA). The Australian government’s failure adequately to address this problem leaves the states’ legislation as the main legal tools to protect the elderly.² Further, the increase in the number of reported instances of financial abuse³ illustrates that the opportunity to exploit the enduring appointment should now be classed as a threat to the elderly.⁴

When theft or fraud occurs through the misuse of an EPA, the remedies available to older Australians are largely undesirable given that they usually occur in the context of a relationship of trust.⁵ Further, their pursuit is also impracticable given that victims of the financial impropriety are often mentally or physically frail, socially isolated, and vulnerable as a result of their cognitive impairment.⁶ The concern is that without proper safeguards that financial exploitation may continue for many years undetected and even after death.⁷ The vulnerable shortcomings stem from lack of proper enforcement mechanisms regulating the abuse of EPAs. A stronger legislative approach is needed⁸ that defines the financial abuse of the elderly as a crime and imposes significant, meaningful and readily enforceable remedies.⁹

I INTRODUCTION

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¹ Paul Blunt, ‘Financial Exploitation of the Incapacitated: Investigation and Remedies (1993) 5(1) *Journal of Elder Abuse and Neglect* 19.

² Joseph Barber, ‘The Kids Aren’t All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes’ (2008) 16(1) *The Elder Law Journal* 108.

³ Mike Clare, Barbara Blundell and Joseph Clare, ‘Examination of the Extent of Elder Abuse in Western Australia (Research Report, The University of Western Australia, April 2011) 1, 31.

⁴ Anne Susskind, ‘Inheritance impatience is a Threat to the Elderly’ (2008) *Law Society Journal of New South Wales* 20.

⁵ Linda Rosenman et al, Submission No 26 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006, 2-3.

⁶ Clare, Blundell and Clare, above n 4, 45.

⁷ Advocare Incorporated, Submission No 71.1 to the Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 24 August 2007, 1.

⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (2007) 28 [2.60].

⁹ Evidence to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 23 March 2007, 32 (David Walsh); Evidence to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Melbourne, 4 June 2007, 86 (Lillian Jeter).

Financial exploitation of the elderly carried out by persons appointed as enduring attorneys has emerged as a national and international issue.¹⁰ The purpose of this paper is to discuss Australia's legal framework regulating the appointment of EPAs and the formalities required to create a valid and effective power. An analysis of the extent to which a donee of an enduring power may be authorised to perform acts on behalf of the donor and the conferred statutory and fiduciary obligations that apply will also be carried out. The recent decision of the Court of Appeal in *Brennan v The State of Western Australia*¹¹ will be considered as a recent example of a donee taking financial advantage of the unregulated enduring appointment. This paper will critically examine the application of the equitable doctrines of undue influence and unconscionable conduct along with the possible breach of a fiduciary duty as separate remedies to recover assets, which may have been misappropriated. The criminal and civil options of redress will also be discussed in this context. It follows that practical recommendations will be made to improve the current legislative framework to ensure that older people are better protected and the risk of exploitation is reduced.

II INCREASING NEED FOR ENDURING POWERS OF ATTORNEY

The increasing ageing population in Western societies and increased demand for family care giving are likely to contribute to a rise in financial abuse of older people.¹² An examination of recent statistics confirms that between 30 June 1991 and 30 June 2011, the number of people aged 65 years and over in Australia increased by 97 600 people to 13.7%.¹³ In fact, the Australian Bureau of Statistics predicated that by 2056 there will be over 6 million people over 65 years of age in Australia.¹⁴ Further, over the past two decades the number of people aged 85 years increased by 169% compared with a total population growth of 31% over the same period.¹⁵ These statistics demonstrate that Australia's population is ageing and that it is likely that a significant proportion of older Australians will lose their decision making capacity.¹⁶ Accordingly, the reliance on EPAs will inevitably increase.¹⁷

III ENDURING POWERS OF ATTORNEY IN AUSTRALIA

¹⁰ Leonie Sanders, 'Financial Abuse of Older People: A Queensland Perspective' (Report, Elder Abuse Prevention Unit, September 2005) 2; Les Jackson, 'The Cost of Elder Abuse in Queensland: Who Pays and How Much' (Report, Elder Abuse Prevention Unit, June 2009) 9. See also Law Reform Commission of Saskatchewan, 'Consultation Paper on Enduring Powers of Attorney' (Consultation Paper, Law Reform Commission of Saskatchewan, 2001) 10.

¹¹ [2010] WASCA 19 (15 February 2010).

¹² Christine Walsh et al, 'Violence Across the Lifespan: Interconnections Among Forms of Abuse as Described by Marginalised Canadian Elders and their Caregivers' (2007) 37(3) *British Journal of Social Work* 491, 492; Dale Bagshaw, Sarah Wendt and Lana Zannettino, 'Preventing the Abuse of Older People by their Family Members' (Stakeholder Paper, Domestic Violence Clearing House, September 2009) 1.

¹³ In fact, in just 12 months to 30 June 2011, the number of people aged 85 years increased by 20 900 people (5.3 percent) to reach 415 400. See Australian Bureau of Statistics, above n 2.

¹⁴ Australian Bureau of Statistics, *Population Projections, Australia* (4 September 2009) Australian Bureau of Statistics <<http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>>. See Office of Senior Victorians, 'Strengthening Victoria's Response to Elder Abuse' (Report, December 2005) 12.

¹⁵ Australian Bureau of Statistics, above n 2.

¹⁶ Catanzariti, above n 2, 1; Office of Senior Victorians, above n 16, 14.

¹⁷ Australian Bureau of Statistics, above n 2. See also Office of the Public Advocate, 'Systems Advocacy' (Fact Sheet, Office of the Public Advocate, 2012) 1: the Public Advocate in Victoria recommends that 'everyone over the age of 18 years should appoint an attorney under an enduring power of attorney (financial)'.

Statutory provision has been made in all jurisdictions to allow the appointment of an EPA to survive the donor's incapacity.¹⁸ The policy motivating the extension of the power of attorney in this way resulted from a 'recognition of the concern experienced by donors and their families, where the donor had appointed a donee as a power of attorney a person whom he or she presumably trusted with his or her affairs, only for the power to terminate as a matter of law upon the loss of mental capacity by the donor'.¹⁹ The current regime allows an individual to informally appoint a person that they trust to act as their enduring attorney.

A Formal Requirements for Appointment

The formal requirements of an enduring document are set out in the relevant state and territory legislation. A family member or friend who is an adult,²⁰ the public trustee, or (in two states) a trustee company, may be appointed as enduring attorneys.²¹

In all jurisdictions, an EPA for financial matters must be in writing,²² signed by the principal²³ and in the approved form.²⁴ In order for an EPA to be validly executed the principal must be mentally capable of doing so.²⁵ There is no streamlined approach to the EPA form as each jurisdiction operates independently from the other in this respect.²⁶ In New South Wales (NSW), South Australia (SA), Northern Territory (NT) and Tasmania (Tas), the 'approved form' is contained in the relevant schedules to the governing statutes.²⁷ Whereas, in Queensland (Qld), Victoria (Vic), and the Australian Capital Territory (ACT) the

¹⁸ Principal provisions are in: *Powers of Attorney Act 1998* (Qld) ch 2; *Powers of Attorney Act 2003* (NSW); *Instruments Act 1958* (Vic) pt XI; *Powers of Attorney and Agency Act 1984* (SA); *Powers of Attorney Act* (NT) pts 2, 4; *Powers of Attorney Act 2000* (Tas) pt 3; *Powers of Attorney Act 2006* (ACT).

¹⁹ Berna Collier and Shannon Lindsay, *Powers of Attorney in Australia and New Zealand* (Federation Press, 1992) 131. See also the comments by the Honourable Haddon Storey, Attorney-General for Victoria, on the second reading of the Instruments (Enduring Powers of Attorney) Bill in Victoria, *Victorian Parliamentary Debates*, Legislative Council, 28 October 1981 (Honourable Haddon Storey, Attorney-General).

²⁰ In all cases, an attorney can only accept an appointment if they are 18 years of age or over.

²¹ Glenn Dickson, 'Enduring Powers of Attorney v GAAT Orders, Part Two' (2004) 24(4) *Proctor* 17. Only Victoria (Vic) and the Northern Territory (NT), allow for a company to be appointed as an attorney under an EPA.

²² *Powers of Attorney Act 1998* (Qld) ss 44(1), (2); *Powers of Attorney Act 2003* (NSW) s 19(1); *Instruments Act 1958* (Vic) s 123(1); *Powers of Attorney and Agency Act 1984* (SA) s 6(1)(a); *Powers of Attorney Act* (NT) s 13; *Guardianship and Administration Act 1990* (WA) s 104(1); *Powers of Attorney Act 2000* (Tas) s 30(1)(a); *Powers of Attorney Act 2006* (ACT) s 19(1).

²³ *Powers of Attorney Act 1998* (Qld) s 44(3)(a)(i); *Powers of Attorney Act 2003* (NSW) s 19(1); *Instruments Act 1958* (Vic) s 123(2)(a); *Powers of Attorney and Agency Act 1984* (SA) s 6(1); *Powers of Attorney Act* (NT) s 13(b); *Guardianship and Administration Act 1990* (WA) s 104(1); *Powers of Attorney Act 2000* (Tas) s 9(1)(b); *Powers of Attorney Act 2006* (ACT) s 19(1)(a).

²⁴ *Powers of Attorney Act 1998* (Qld) s 44(1); *Powers of Attorney Act 2003* (NSW) s 8; *Instruments Act 1958* (Vic) s 123(1); *Powers of Attorney and Agency Act 1984* (SA) s 6(1)(a); *Powers of Attorney Act* (NT) s 13(b); *Guardianship and Administration Act 1990* (WA) s 104(1)(a); *Powers of Attorney Act 2000* (Tas) s 30(1); *Powers of Attorney Act 2006* (ACT) s 13.

²⁵ *Powers of Attorney Act 1998* (Qld) ss 41(1), (2); *Powers of Attorney Act 2003* (NSW) s 18; *Instruments Act 1958* (Vic) ss 118(1), (2); *Powers of Attorney and Agency Act 1984* (SA) s 6(1)(a); *Powers of Attorney Act* (NT) s 13; *Guardianship and Administration Act 1990* (WA) s 104(1); *Powers of Attorney Act 2000* (Tas) s 30(1)(a); *Powers of Attorney Act 2006* (ACT) s 19(1).

²⁶ There is, however, statutory recognition by the relevant states and territory of enduring powers of attorney created outside the jurisdiction.

²⁷ *Powers of Attorney Act 2003* (NSW) s 8; *Powers of Attorney and Agency Act 1984* (SA) s 5(1); *Powers of Attorney Act* (NT) s 13; *Powers of Attorney Act 2000* (Tas) ss 30(1)(b), (c).

'approved form' is publicly available through, for example, the Qld Department of Justice,²⁸ Vic and WA Office of the Public Advocate²⁹ and the ACT Public Trustee.³⁰ In all cases, for the power to be enduring, however, the principal must sign to an additional provision that the power will continue to have effect even after loss of capacity.³¹

An enduring document must be signed and dated by an eligible witness.³² The obligations imposed on the witness of an enduring document are more onerous than those generally imposed on witnesses in other circumstances.³³ In all jurisdictions witnesses are required to certify that the document was signed by the principal in the witness's presence.³⁴ In addition, in Qld,³⁵ NSW,³⁶ Vic,³⁷ and the ACT,³⁸ the document must be accompanied by a witness's certificate, which certifies that the principal appeared to have understood the nature and effect of making the power of attorney.³⁹

An enduring power of attorney only becomes effective once the attorney has signed and dated a statement of acceptance.⁴⁰ If more than one attorney is appointed, each attorney may only

²⁸ Queensland Government, *Form 2 – Enduring Power of Attorney* (2 June 2003) Department of Justice and Attorney General <http://www.justice.qld.gov.au/__data/assets/pdf_file/0004/15970/enduring-power-attorney-short-term.pdf>.

²⁹ Office of the Public Advocate, *Enduring Power of Attorney Financial Form* (18 January 2011) <[http://www.publicadvocate.vic.gov.au/file/file/Powerofattorney/Power percent20of percent20attorney percent20forms percent202010/Enduring_power_of_attorney_financial_form2010.pdf](http://www.publicadvocate.vic.gov.au/file/file/Powerofattorney/Power%20of%20attorney%20forms%202010/Enduring_power_of_attorney_financial_form2010.pdf)>. See also Government of Western Australia, *Enduring Power of Attorney* (16 July 2012) Office of the Public Advocate <http://www.publicadvocate.wa.gov.au/E/enduring_power_of_attorney.aspx>.

³⁰ The Public Trustee, *ACT Enduring Power of Attorney Form* <<http://www.publictrustee.act.gov.au/powers-of-attorney>>.

³¹ *Powers of Attorney Act 1998* (Qld) s 32(2); *Powers of Attorney Act 2003* (NSW) s 21(2); *Instruments Act 1958* (Vic) s 115(2); *Powers of Attorney and Agency Act 1984* (SA) s 6(b); *Powers of Attorney Act* (NT) s 13; *Guardianship and Administration Act 1990* (WA) s 104(1)(b)(i); *Powers of Attorney Act 2000* (Tas) s 30(2); *Powers of Attorney Act 2006* (ACT) s 32(1). This requirement is also stated in, for example, Item 8(4)(a) of the *Enduring Power of Attorney – Short Form* in Queensland which requires the principal to certify that they understand that the power of attorney for financial matters (if applicable) begins at the time stated in the document and continues even if the principal loses capacity. See also Keith Bradley, 'Powers of Attorney' (2008) 86 *Precedent* 16, 17.

³² *Powers of Attorney Act 1998* (Qld) s 44(3); *Powers of Attorney Act 2003* (NSW) s 19(1)(b); *Instruments Act 1958* (Vic) s 123(3); *Powers of Attorney and Agency Act 1984* (SA) s 6(2); *Powers of Attorney Act* (NT) s 6(4); *Guardianship and Administration Act 1990* (WA) s 104(2); *Powers of Attorney Act 2000* (Tas) s 9(1)(a); *Powers of Attorney Act 2006* (ACT) s 19(2).

³³ Lindy Willmott and Ben White, 'Solicitors and Enduring Documents: Current Practice and Best Practice' (2008) 16 *Journal of Law and Medicine* 466, 467. See also Lindy Willmott and Ben White, 'Health and Guardianship Law: Witnessing Enduring Powers of Attorney by Solicitors' (2008) 28 *Queensland Lawyer* 235, 237.

³⁴ *Powers of Attorney Act 1998* (Qld) s 44(4)(b); *Powers of Attorney Act 2003* (NSW) s 19(1)(c); *Instruments Act 1958* (Vic) s 123(3); *Powers of Attorney and Agency Act 1984* (SA) s 6(2); *Powers of Attorney Act* (NT) s 6(4); *Guardianship and Administration Act 1990* (WA) s 104(2); *Powers of Attorney Act 2000* (Tas) s 9(1)(b); *Powers of Attorney Act 2006* (ACT) s 19(2).

³⁵ *Powers of Attorney Act 1998* (Qld) s 44(4)(b).

³⁶ *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

³⁷ *Instruments Act 1958* (Vic) s 125A.

³⁸ *Powers of Attorney Act 2006* (ACT) s 22.

³⁹ See Nick O'Neill and Peter Whitehead, 'Powers of Attorney: New Safeguards against Financial Abuse' (2004) 42(1) *Law Society Journal* 52.

⁴⁰ *Powers of Attorney Act 1998* (Qld) s 33; *Powers of Attorney Act 2003* (NSW) s 20; *Instruments Act 1958* (Vic) s 125B; *Powers of Attorney and Agency Act 1984* (SA) s 6(2)(b); *Powers of Attorney Act* (NT) s 13; *Guardianship and Administration Act 1990* (WA) s 104(2); *Powers of Attorney Act 2000* (Tas) s 30(2); *Powers of Attorney Act 2006* (ACT) s 23. See Peter Whitehead, 'Powers of Attorney Reform in NSW' (2004) 3 *Elder Law Review* 4.

carry out their role under the enduring document once they have signed and accepted it.⁴¹ However, where there are joint attorneys with the same functions, ‘the safer position is that the power of attorney is not capable of being operated until all joint enduring attorneys have accepted it’.⁴²

The commencement and revocation of the appointment are particularly important issues that donors should carefully consider. Consideration should be given as to how the donee will ascertain that the donor has lost capacity and whether active monitoring of the donor’s capacity is required.⁴³ This is largely considered a grey area particularly if the donor decides to conceal their decline or are not aware of their diminishing capacity.⁴⁴ Unless the enduring document is revoked by the donor or by a state or territory tribunal,⁴⁵ the effect of the creation of an enduring document is that it allows the attorney to enter into transactions as though the principal would have understood and consented to the nature of the act at the time.⁴⁶

B Scope of Authority

An enduring power of attorney, in the prescribed form, confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully do.⁴⁷ The extent of this appointment is immense⁴⁸ as the concept of autonomy sits ill-at-ease with the requirement that third persons may make financial decisions.⁴⁹ The scope of authority by the person to whom the authority is given is limited to acting in an agency capacity, subject to the constraints of a fiduciary position.⁵⁰ An enduring appointment for financial matters allows an attorney to, for example, operate bank accounts, manage and pay bills and lease or sell property.⁵¹ The terms of the instrument may, however, limit the scope of authority to specific matters.⁵² This is particularly if the principal does not require the EPA to be invoked or to be used in the short term until the principal lacks capacity.⁵³

The extent of an enduring attorney’s authority was considered by White J in *In the Will of Bob Wild Deceased*.⁵⁴ The court was required to consider whether an enduring attorney who

⁴¹ Nick O’Neill and Carmelle Peisah, ‘Chapter 10 – Enduring Powers of Attorney’ in *In Capacity and the Law* (Sydney University Press Law Book, 2005) [10.5.2].

⁴² O’Neill and Peisah, above n 43. See Mark Weinberg, ‘The Australian Law of Theft’ (1978) 2 *University of New South Wales Law Journal* 405.

⁴³ Glenn Dickson, ‘Enduring Powers of Attorney v GAAT Orders: Part One’ (2004) 24(3) *Proctor* 11, 12.

⁴⁴ Frances Matthews, ‘Doctors, Elder Abuse and Enduring Powers of Attorney’ (2004) 117(1202) *The New Zealand Medical Journal* 1, 4.

⁴⁵ For example, the Victorian Civil and Administrative Tribunal or the Queensland Civil and Administrative Tribunal.

⁴⁶ *Instruments Act 1958* (Vic) s 115.

⁴⁷ *Powers of Attorney Act 2003* (NSW) s 3AC(1).

⁴⁸ Kelly Purser, Eilis Magner and Jeanne Madison, ‘Competency and Capacity: The Legal and Medical Interface’ (2009) 16 *Journal of Law and Management* 789, 792.

⁴⁹ See Christian Witting, ‘Medical Decision-Making for the Incompetent’ (1996) 3 *Journal of Law and Medicine* 377, 383.

⁵⁰ *Spina v Conran Associates Pty Ltd* [2008] NSWSC 326 (14 April 2008).

⁵¹ Carolyn Sappideen and Sue Field, ‘Coming of Age’, *About the House* (Canberra, Australian Capital Territory), March 2007, 24.

⁵² See, eg, *Powers of Attorney Act 1998* (Qld) s 32(1)(b); *Instruments Act 1958* (Vic) s 115. See *Sydney Concrete & Contracting Pty Ltd v BNP Paribas Equities (Australia) Ltd* [2004] NSWSC 530 (25 June 2004) [93]. Willmott and White, above n 35, 287.

⁵³ Dickson, above n 23, 18.

⁵⁴ [2002] QSC 200 (17 July 2002).

was appointed by the sole executrix of the Will had the authority to apply for a grant of probate on behalf of the executrix. The donor of the EPA (who was also the executrix of the Will) suffered, at the time of the application, dementia and was considered incapable of managing his own affairs. Her Honour concluded that the legislation under which the enduring attorney was appointed is comprehensive in its description and so long as the instrument does not state to the contrary, ‘an attorney is taken to have the maximum power that could be given to the attorney by the enduring document’.⁵⁵

C Statutory Obligations

The relevant states and territories maintain legislation which details the statutory duties that enduring attorneys must comply with. These duties are imposed on the donee of the enduring power to protect the interests of the donor.⁵⁶ In managing a person’s financial affairs, a donee of an enduring document is obliged to exercise their powers honestly and with reasonable diligence to protect the interests of the donor.⁵⁷ An attorney for a financial matter may only enter into a conflict transaction if the principal authorises the transactions.⁵⁸ For example, in NSW and Qld, enduring attorneys must not use the principal’s funds to give gifts or benefits to themselves or third parties, unless the principal expressly authorises the attorney to do so.⁵⁹

D Fiduciary Obligations

At the heart of an enduring appointment is the central fiduciary obligation of loyalty to the principal.⁶⁰ This obligation arises from general law but is also implied in the relevant state and territory legislation.⁶¹ It arises as ‘there is inherent in the nature of the relationship itself a position of disadvantage or vulnerability on the part of one of the parties which causes him or her to place reliance upon the other and requires the protection of the conscience of that other party’.⁶² It is for these reasons that the fiduciary obligation is proscriptive⁶³ so as not to allow

⁵⁵ *In the Will of Bob Wild Deceased* [2002] QSC 200 (17 July 2002) [14]. White J also noted that an exercise of power as an attorney for an adult who has impaired capacity must confirm with the general principles noted in the legislation under which the appointment was made.

⁵⁶ These are in addition to the general requirements of attorneys to, for example, maintain adequate records or keep property separate. See *Moylan v Rickard* [2010] QSC 327 (6 September 2010). See also Tina Cockburn, ‘Elder Financial Abuse by Attorneys: Relief under Statute and in Equity’ (2005) 25(5) *Proctor* 22.

⁵⁷ See, eg, *Powers of Attorney Act 1998* (Qld) s 66; *Powers of Attorney Act 2000* (Tas) s 32(1).

⁵⁸ See, eg, *Powers of Attorney Act 1998* (Qld) s 73. By way of example, the Queensland legislation provides an example of a conflict transaction to include where an attorney, for a financial matter, buys the principal’s car.

⁵⁹ *Powers of Attorney Act 2003* (NSW) sch 3; *Powers of Attorney Act 1998* (Qld) s 88. O’Neill and Whitehead, above n 41, 54. If the principal wishes to allow the attorney to provide gifts to a wide range of recipients the language that defines the benefits received by the attorney or a third party must be specific and unambiguous.

⁶⁰ *Breen v Williams* (1996) 186 CLR 71, 93. See Malcolm Cope, ‘A Comparative Evaluation of Developments in Equitable Relief for Breach of Fiduciary Duty and Breach of Trust’ (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 118 [201]. See also *Re OAC* [2008] QGAAT 72 (14 October 2008) [16] (Presiding Member Johnston, Member Mills and Member Bayne). The essence of the enduring appointment is that an attorney is appointed to protect the interests of an adult.

⁶¹ See, eg, *Powers of Attorney Act 2003* (NSW) s 9. See also Roderick Meagher, John Heydon and Mark Leeming (eds), *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (2nd ed, 1984) 107 who state that the fiduciary duty is unique and unlike any other as it is a relationship of confidence in which a duty is imposed “upon the person in whom confidence is reposed in order to prevent the abuse of the confidence”.

⁶² *Re OAC* [2008] QGAAT 72 (14 October 2008) [17] (Presiding Member Johnston, Member Mills and Member Bayne).

⁶³ Leon Firios, ‘Precluding Prescriptive Duties in Fiduciary Relationships: The Problems with the Proscriptive Delimitation’ (2012) 40 *Australian Business Law Review* 166, 167.

the attorney to promote their personal interests ahead of their principal's.⁶⁴ One of the fiduciary principles prohibits the making or pursuit of a gain where there is a conflict between their personal interests and that of the principal's without the principal's informed consent. An attorney who has accepted the enduring appointment must act in good faith and must only deal with the principal's assets in the interests of the principal.⁶⁵ Any benefit obtained without full disclosure to the principal and their informed consent contravenes the fundamental nature of the fiduciary relationship.⁶⁶

IV FINANCIAL EXPLOITATION THROUGH EPAS

The financial abuse by enduring attorneys has become a pervasive social concern.⁶⁷ The abuse stems from the relatively informal, low cost and private nature of the appointment which are considered the practical advantages.⁶⁸ Given the lack of scrutiny and regulation of these private arrangements, however, donors are susceptible to financial impropriety.⁶⁹ The impact upon the incapacitated and elderly is both immediate and severe.⁷⁰ Cognitive impairment or dementia of donors is considered to be the major factor for the abuse.⁷¹ While each situation presents its own facts, certain predictable cases have emerged.⁷²

An investigation of the recent cases in Australia demonstrates that the common thread is the existence of a family member, friend, caregiver or trusted professional in whom the elder has placed trust and confidence.⁷³ However, in the majority of cases, the elder is physically,

⁶⁴ Patrick Keane, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 84 *Australian Law Journal* 92, 99.

⁶⁵ See *Powell v Thompson* [1991] 1 NZLR 597, 605 where Thomas J stated that an attorney cannot utilise a power of attorney to pay his or her personal debts and to do so contravenes the fundamental nature of an agency fiduciary relationship. See also Victorian Law Reform Commission, 'Guardianship: Final Report' (Report, Victorian Law Reform Commission, 18 April 2012) 381.

⁶⁶ Stacey Smith and Peter McCrohon, *Wealth and Estate Planning Law Update* (April 2011) McCrohon Bergseng Partners <<http://www.mbplegal.com.au/documents/wealth/2011/04/Powerspercent20ofpercent20attorneypercent20-percent20minimisingpercent20andpercent20dealingpercent20withpercent20abuse.pdf>>.

⁶⁷ John Billings, 'Redressing Financial Abuse by an Attorney under an EPA' (Paper presented at LexisNexis Wills, Succession and Estate Planning Conference, Melbourne, 6 March 2007). See also Duncan Boldy et al, 'Addressing Elder Abuse: Western Australian Case Study' (2005) 24(1) *Australasian Journal on Ageing* 3, 6-7.

⁶⁸ Robin Creyke, 'Focusing on Individual Needs: Developing the Law's Mechanisms for Mentally Disabled and Elderly People' (1993) 46 *International Social Security Review* 79. See also Terry Carney, 'Globalisation and Guardianship: Harmonisation or (Postmodern) Diversity?' (2001) 24 *International Journal of Law and Psychiatry* 95, 103.

⁶⁹ Terry Carney, 'Abuse of Enduring Powers of Attorney – Lessons from the Australian Tribunal Experiment?' (1999) 18 *New Zealand Universities Law Review* 481. See Terry Carney and Patrick Keyzer, 'Planning for the Future: Arrangements for the Assistance of People Planning for the Future of People with Impaired Capacity' (2007) 7(2) *Queensland University Law and Justice Journal* 255, 269.

⁷⁰ Blunt, above n 1, 22.

⁷¹ Susan Kurrle, 'Elder Abuse' (2004) 33(10) *Australian Family Physician* 807, 809. See also Seniors Rights Victoria, Submission to the Victorian Parliament Law Reform, *Inquiry into Powers of Attorney*, 21 August 2009, 31. Elder abuse is also said to be a result of the limited understanding of the powers and duties, which regulate the appointment.

⁷² Owen Ames and John Harley, 'Elder Abuse: Being Part of the Solution, Not Part of the Problem' (2001) 23(3) *Law Society of South Australia Bulletin* 34, 35.

⁷³ See Kurrle, above n 73, 809, where Kurrle alarmingly suggests that the majority of abusers of older people in Australia are close family members representing approximately 90 percent of elder abuse cases. See also Victorian Parliament Law Reform Committee, 'Streamlining Powers of Attorney' (2009) 83(6) *Law Institute Journal* 72. In each case, delegation of financial authority by way of an EPA by the exploiter may be overt or may occur as a result of more subtle conditions.

emotionally and or physiologically dependent on the caregivers. In other situations, the elder may have once been perfectly capable of handling their financial affairs but dementia, strokes or other ailments have caused them to lose interest and ability in such matters.⁷⁴

A Brennan v The State of Western Australia – The Facts

The recent decision of the Court of Appeal in *Brennan v The State of Western Australia*⁷⁵ exemplifies the severity of the palpable misuse of an enduring document to obtain a financial benefit from an elderly person. The facts were extreme and the abuse occurred in a very dishonest and deceptive manner.⁷⁶ A summary of the facts are as follows:

Mr Kopec was a Polish immigrant who settled in the region after World War II and owned a farm. He never married, had few relatives in Australia and lived by himself in primitive conditions on the farm. As time passed his physical and mental health deteriorated and he was introduced to Mr Damien Brennan, a legal practitioner.⁷⁷

In 2000, Mr Kopec executed an EPA in favour of Mr Brennan to manage Mr Kopec's affairs, including collecting rent from investment properties, selling Mr Kopec's farm and paying his bills. Pursuant to the EPA, Mr Brennan was able to operate Mr Kopec's bank account and sell and buy property in the name of Mr Kopec.⁷⁸

In August 2001, Mr Brennan stole \$125 000.00 from Mr Kopec's bank account and on a further 58 occasions stole further funds totalling \$767 245.30.

On 13 February 2006, Mr Kopec died. Mr Brennan did not notify the banks and other institutions of the Mr Kopec's death. Instead, Mr Brennan continued to operate the deceased's bank account pursuant to the EPA although he had no authority to do so as, by law, the power of attorney was revoked.

On 12 April 2006, Mr Brennan stole \$15 000 and on a further 9 occasions stole from the deceased's estate a total of \$129 542.00.⁷⁹

On 30 May 2007, in reliance on the EPA Mr Brennan instructed a stockbroker in Busselton to sell 2000 Wesfarmers shares held by the deceased. Mr Brennan did not notify the stockbroker that Mr Kopec had died and that he no longer had any authority to deal with his property. Mr

⁷⁴ Blunt, above n 1, 19.

⁷⁵ [2010] WASCA 19 (15 February 2010).

⁷⁶ The facts of this case are well described by Owen JA in *Brennan v The State of Western Australia* [2010] WASCA 19 (15 February 2010) along with the reasons for decision of the State Administrative Tribunal in Western Australia involving the Legal Profession Complaints Committee in *Legal Profession Complaints Committee and Damien Gerard Brennan* [2010] WASAT 46 (7 April 2010) (Chaney J, Pritchard J and Member Gillett).

⁷⁷ Mr Brennan was a legal practitioner in the Busselton and Margaret River areas of Western Australia.

⁷⁸ During this period, Mr Brennan charged professional fees of \$71 349.36. See *Legal Profession Complaints Committee and Damien Gerard Brennan* [2010] WASAT 46 (7 April 2010) [6] (Chaney J, Pritchard J and Member Gillett).

⁷⁹ *Legal Profession Complaints Committee and Damien Gerard Brennan* [2010] WASAT 46 (7 April 2010) [3] (Chaney J, Pritchard J and Member Gillett).

Brennan directed that the shares be sold and a cheque for \$73 790.02 was sent to his Busselton office.⁸⁰

In April 2009 Mr Brennan was convicted on his plea of guilty of 70 counts of stealing from Mr Jozef Kopec's estate a total of \$896 787.00.⁸¹ Mr Brennan was also convicted of fraudulently attempting to gain a benefit,⁸² namely the sum of \$73 790.02.⁸³

This case is a perfect example of the deliberate fraud arising from the exploitation of the appointment as an EPA. Of notable concern is that the abuse continued undetected for many years. It was only after Mr Kopec's death that the suspicion of Mr Brennan which was instilled in relatives who insisted that an investigation of Mr Brennan be conducted.⁸⁴ As at the date of this article, the writer was unable to locate any application by any executor or administrator of Mr Kopec's estate seeking to recover the assets, which were embezzled. Notwithstanding, there are certainly avenues available to those executors or administrators appointed to recover the assets that are misappropriated.

V AVAILABLE REMEDIES

An overview of the remedies available in circumstances of financial impropriety by attorneys in reliance on the EPA is set out below.⁸⁵ The recovery of misappropriated assets is usually the subject of separate proceedings depending on the financial abuse as well.⁸⁶

A Statutory Remedies

Failure to comply with the statutory obligations may result in the imposition of substantial pecuniary penalties and in some states possible liability to compensate the donor for any loss caused.⁸⁷ Where an attorney takes a personal benefit from the exercise of power not expressly authorised it is likely that they have breached their statutory duties owed to their principal. In Qld, SA and the ACT, failure by an attorney to comply with their statutory duties in the exercise of a power establishes a right for the principal (or their executor/administrator) to apply for compensation.⁸⁸ However, the remaining states and territory do not provide any legislative right to seek compensation or damages from an attorney where the principal's assets have been misappropriated. Instead, they empower the states and territory courts and

⁸⁰ By way of note, Mr Brennan was not able to obtain the benefit of the proceeds of the sale of the Wesfarmers shares because the cheque was sent to his office and the supervising solicitor collected all mail coming into Mr Brennan's office. See *Legal Profession Complaints Committee and Damien Gerard Brennan* [2010] WASAT 46 (7 April 2010) [14] (Chaney J, Pritchard J and Member Gillett).

⁸¹ *Criminal Code Act 1913* (WA) s 378.

⁸² *Criminal Code Act 1913* (WA) 409(1).

⁸³ *Legal Profession Complaints Committee and Damien Gerard Brennan* [2010] WASAT 46 (7 April 2010) [1] (Chaney J, Pritchard J and Member Gillett). The benefit of approximately \$73 790.02 attempted to be gained was the proceeds of the sale of shares held in an account in the name of the deceased.

⁸⁴ Scott Johnson, 'Elder Abuse: The Need for Law Reform' (Report, Northern Suburbs Community Legal Centre Incorporated, 27 April 2010) 21.

⁸⁵ Lisae Jordan, 'Elder Abuse and Domestic Violence: Overlapping Issues and Legal Remedies' (2001) 15(2) *American Journal of Family Law* 147, 148.

⁸⁶ Smith and McCrohon, above n 68.

⁸⁷ *Powers of Attorney Act 2000* (Tas) s 32(2); *Power of Attorney Act 1998* (Qld) ss 106-7.

⁸⁸ *Powers of Attorney Act 1998* (Qld) s 107; *Powers of Attorney Act 2006* (ACT) s 50; *Powers of Attorney and Agency Act 1984* (SA) s 7. See *Kebbell v Reynolds and anor* [2012] QSC 88 (30 March 2012). See Berna Collier, 'Overview of the Powers of Attorney Act 1998 (Qld)' (1998) 6 *Australian Property Law Journal* 206, 207.

tribunals to, on application, or on their own initiative, to revoke an enduring document if it is satisfied that it is in the best interests of the donor.⁸⁹ Further, where an attorney under an enduring document benefits from a principal's estate, the court may order that the attorney compensate the principal's estate.⁹⁰

B Common Law Remedies

There are three fundamental equitable grounds upon which a court may intervene to set aside a transaction.

1 Breach of a Fiduciary Duty

The first occurs where an attorney obtains a profit for himself or herself or a related party in conflict with the interests of the principal.⁹¹ In those circumstances, it is likely that a breach of the donee's fiduciary duty has occurred and an application may be brought accordingly.⁹² In *Smith v Glegg*,⁹³ the plaintiff argued that the attorney was in breach of the fiduciary duty as an attorney under an EPA as a duty was owed not to put her own interests ahead of the principal. The attorney as a fiduciary will generally be held accountable for any benefit or gain acquired by the attorney through breach of his or her duty.⁹⁴ In *Re DEM*⁹⁵ the Tribunal determined that the evidence provided in respect to the gift transaction was inadequate to rebut the statutory presumption of undue influence.

2 Unconscionable Conduct

Secondly, a plaintiff may argue that the transaction has been caused by the effect of an importunity of the plaintiff so as to amount to unconscionable conduct on the part of the plaintiff's attorney.⁹⁶ The doctrine of unconscionability looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, dealing with a person under a special disability.⁹⁷ The High Court's decision in *Commercial Bank of Australia Ltd v Amadio*⁹⁸ settled the principles in respect to unconscionability and may be granted where the following three elements have been satisfied:⁹⁹

⁸⁹ *Powers of Attorney Act 2003* (NSW) s 28; *Instruments Act 1958* (Vic) s 125Q; *Powers of Attorney Act* (NT) s 17; *Guardianship and Administration Act 1990* (WA) s 109; *Powers of Attorney Act 2000* (Tas) s 33.

⁹⁰ See eg *Powers of Attorney Act 1998* (Qld) s 106(4) which provides that if the principal or attorney have died, the application for compensation must be made to a court within 6 months after the first death.

⁹¹ Cockburn, above n 58, 23.

⁹² *Smith v Glegg* [2004] QSC 443 (9 December 2004) [58] the Defendant argued that the Defendant owed the Plaintiff fiduciary duties but the extent of those duties were identified and modified by the contents of the Enduring Power of Attorney.

⁹³ [2004] QSC 443 (9 December 2004).

⁹⁴ Smith and McCrohon, above n 68.

⁹⁵ [2005] QGAAT 59 (26 September 2005).

⁹⁶ Kwai-Lian Liew, 'Breach of Fiduciary Duties by a Solicitor. What is an Appropriate Equitable Remedy? An Analysis of Maguire and Tansey v Makaronis and Makaronis' (1996) 2 *Bond University High Court Review* 1, 7.

⁹⁷ *Bridgewater v Leahy* [1997] QCA 036 (14 March 1997) 472. See also *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474-475.

⁹⁸ (1983) 151 CLR 447.

⁹⁹ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462. See also Brenda Marshall, 'Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility' (1995) 7(2) *Bond Law Review* 42, 43.

- (a) one party has a ‘special disadvantage’;
- (b) the disability is sufficiently evident that the stronger party knew or ought to have known of the weaker party’s special disadvantage;¹⁰⁰ and
- (c) the stronger party took unfair advantage of the weaker party’s special disadvantage to obtain a benefit for him/herself.

The concept of special disadvantage is that the weaker party cannot make a judgment as to what is in his or her own best interests¹⁰¹ or ‘is unable to judge for himself or [herself]’.¹⁰² The situations where a special disadvantage is said to arise which may induce a court of equity to set aside a transaction on the basis of unconscionable conduct are not closed.¹⁰³ In *Blomley v Ryan*,¹⁰⁴ Fullagar J, in the course of his judgement, explained that a special disadvantage could amount to poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.¹⁰⁵

The principles of unconscionable conduct apply with equal force to Mr Kopec’s circumstances as described in *Brennan v The State of Western Australia*.¹⁰⁶ Mr Brennan, as donee, took advantage of his position as an EPA to obtain a benefit through a grossly improvident set of transactions on the part of the donor.¹⁰⁷ He was able to do so given Mr Kopec’s age, poor health and frailty and continued to exploit his position even after Mr Kopec’s death.¹⁰⁸ It was clear that Mr Kopec was dependent on Mr Brennan given he had appointed him as his EPA to manage his affairs including his finances.¹⁰⁹ Mr Brennan, as donee, deliberately misused that dependence and the EPA to advance his own finances. Mr Kopec was a person under a special disability of which Mr Brennan was plainly aware when he continued to operate the EPA and took financial benefits. Mr Brennan’s conduct was legally unconscionable.¹¹⁰

3 Undue Influence

The third form of equitable relief arises if it can be established that the donee had procured the transaction by undue influence.¹¹¹ The basis of undue influence is to prevent the

¹⁰⁰ It is where one party to a transaction is under a special disability in dealing with the other with the consequence that there is an absence of any reasonable degree of equality between them.

¹⁰¹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 467; *Louth v Diprose* (1992) 175 CLR 621, 626, 628-9. See also *Clarke v Lopwell Pty Ltd* [2008] NSWCS 615 (18 June 2008).

¹⁰² *Blomley v Ryan* (1956) 99 CLR 362, 392.

¹⁰³ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462. It is truly the unfair or unconscientious advantage that is taken of the opportunity created by the innocent party.

¹⁰⁴ (1956) 99 CLR 362.

¹⁰⁵ *Blomley v Ryan* (1956) 99 CLR 362, 405.

¹⁰⁶ [2010] WASCA 19 (15 February 2010).

¹⁰⁷ *Bridgewater v Leahy* (1998) 194 CLR 457, 493 [123].

¹⁰⁸ Mr Kopec had few relatives in Australia and subsequently became heavily reliant upon Mr Brennan.

¹⁰⁹ See Gino Dal Pont, ‘Enduring Power: Being Lax About Client Capacity can Lead to Disciplinary Consequences’ (2012) 50(3) *Law Institute Journal* 74.

¹¹⁰ In February 2012, the New South Wales Supreme Court in *Ryan v Aboody* [2012] NSWSC 136 (27 February 2012) set aside a transfer of residential property from an elderly, who was on a disability pension for injuries he sustained on active service throughout World War II, to his daughter and son in law based on an unshakable belief that his property would otherwise be taken away by the incoming Labor Federal government on the basis of unconscionable conduct.

¹¹¹ Nick O’Neill and Carmelle Peisah, ‘Chapter 3 – Incapacity and Contracts and Gifts During Lifetime (Sydney University Press Law Book, 2011) [3.5.3]; Fiona Burns, ‘Elders and Testamentary Undue Influence in Australia’ (2005) 28(1) *University of New South Wales Law Journal* 145, 150.

unconscionable use of a special capacity or opportunity that may exist or arise which affects the person's will or freedom of judgment.¹¹² This form of relief is also presumed under Qld legislation where a transaction is between a principal or a relation, business associate or close friend of the attorney, that the principal was induced to enter into the transaction.¹¹³

There are two broad forms of unacceptable conduct in which the presumption of undue influence may be raised.¹¹⁴ First, what may be considered as non-relational undue influence¹¹⁵ requires affirmative proof by the party alleging that the transaction was made due to some deliberate acts of improper pressure or coercion.¹¹⁶ Second, relational undue influence will be presumed from a relationship of trust and confidence between the parties. The latter is of particular relevance in the present context, although is more enigmatic, and requires proof that:¹¹⁷

- (a) a relationship of trust and confidence existed; and
- (b) the parties entered into a transaction which was manifestly disadvantageous to the elder.

Some relationships are 'deemed' relationships and, as a matter of law, have been judicially recognised as being likely to give rise to the presumption of undue influence.¹¹⁸ However, the relationship between a donor and donee of an EPA is not regarded as one that is 'deemed'.¹¹⁹ Notwithstanding, in *Stivactas v Michaletos (No 2)*,¹²⁰ Kirby P stated that the categories of relationship giving rise to a presumption of undue influence are not closed.¹²¹ There are

¹¹² *Johnson v Buttress* (1936) 56 CLR 113, 134.

¹¹³ *Powers of Attorney Act 1998* (Qld) s 87; John Meredith, 'Miami Advice or California Dreaming: A Statutory Presumption of Testamentary Undue Influence' (2011) 31 *Queensland Lawyer* 170, 170.

For example, in *Smith v Glegg* [2004] QSC 443 (9 December 2004) [31] the Plaintiff argued that the defendant had procured the transaction by undue influence, which was presumed under *Powers of Attorney Act 1998* (QLD) s 87 and also in equity as a consequence of the Plaintiff's relationship of almost total dependency upon the Defendant.

¹¹⁴ *Allcard v Skinner* (1887) 36 Ch D 145, 171. Lindley LJ noted that undue influence involved 'some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor': *Allcard v Skinner* (1887) 36 Ch D 145, 181.

¹¹⁵ Lorna Fox O'Mahoney and James Devenney, 'Undue Influence, the Elderly and Equity Release Schemes' (2008) 5 *Elder Law Review* 1, 11.

¹¹⁶ *Royal Bank of Scotland v Etridge (No.2)* [2001] 4 All ER 449, 462. In *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757 Lord Denning classified the test as the strong gaining an advantage from the weak by some fraud and deliberate act and, alternatively, undue pressure. See also Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499.

¹¹⁷ Fox O'Mahoney and Devenney, above n 116, 12.

¹¹⁸ *Louth v Diprose* (1992) 175 CLR 621, 628; *Johnson v Buttress* (1936) 56 CLR 113, 119, 134; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 577. The latter is of particular relevance in the present context as that relationship may arise between an elder and child, carer, or lawyer such as in the present case for Mr Kopec. See *Lancashire Loans Ltd v Black* [1934] 1 KB 380; *Hylton v Hylton* (1754) 28 ER 349; *Westmelton (Vic) Pty Ltd v Archer & Shulman* [1982] VR 305.

¹¹⁹ Until recently the argument that such a fiduciary relationship should give rise to the presumption of undue influence has been rejected. In *Janson v Janson* [2007] NSWSC 1344 (23 November 2007) the court rejected the Plaintiff's submission that the donee of a power of attorney is subject to fiduciary duties and is required to accord priority to the interests of the donor where there is a conflict between the two and the use of the power by the power of attorney contrary to the known wishes and directions of the donor is a breach of trust.

¹²⁰ [1994] ANZ ConvR 252.

¹²¹ *Stivactas v Michaletos (No 2)* [1994] ANZ ConvR 252.

cogent arguments to suggest that the relationships between a donor and donee should be included in such a category.¹²²

In order for the court to recognise that such a relationship existed, an elder (or their executor / administrator) must demonstrate that they trusted or were in some way, dependant or vulnerable on the one hand and ascendancy or control was exerted by the party who benefited from the transaction.¹²³ These characteristics were certainly prevalent in Mr Kopec's circumstances given that the inherent purpose of an EPA is that once the donor lacks capacity, complete dependence is placed on a donee. In *Trevenar v Ussfeller*,¹²⁴ a somewhat analogous case to the present, a relational dependence was found between an 83 year old widow who had appointed her accountant as her attorney. The high level of emotional dependence demonstrated that there was a special relationship of trust and confidence between the parties such as to give rise to a presumption of undue influence and the alleged gifts exceeding \$500 000.00 were set aside.¹²⁵ Again in *Janson v Janson*,¹²⁶ the Court noted that a presumption of undue influence arose between a donor and donee of a general power of attorney on the basis that the donor had a dependence or trust on the donee and as such was in a position of influence.¹²⁷

4 Challenges in their Pursuit

Despite the availability of legal remedies, older people face a number of challenges if they intend on pursuing legal avenues in the face of financial abuse.¹²⁸ While the remedy may vary according to the factual nature of the abuse the court has far reaching powers and may order that:¹²⁹

- (a) the offending transaction should be rescinded;

¹²² Fox O'Mahoney and Devenney, above n 116, 12. See also Peter Whitehead, 'A Review of the Response of the Courts and NSW Guardianship Tribunal to Cases of Financial Abuse' (2008) 5(6) *Elder Law Review*.

¹²³ *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, 462 [31]; *Johnson v Buttress* (1936) 56 CLR 113, 119, 134–135; *Janson v Janson* [2007] NSWSC 1344 (23 November 2007) [72]. See Burns, above n 117, 520.

¹²⁴ [2005] NSWSC 582 (23 June 2005).

¹²⁵ *Trevenar v Ussfeller* [2005] NSWSC 582 (23 June 2005) [47]–[48]. Tina Cockburn and Barbara Hamilton, 'Equitable Remedies for Elder Financial Abuse in Inter Vivos Transactions' (2011) 31 *Queensland Lawyer* 123, 125.

¹²⁶ [2007] NSWSC 1344 (23 November 2007).

¹²⁷ *Janson v Janson* [2007] NSWSC 1344 (23 November 2007) [99] where the Plaintiff, 92 year old bachelor who was profoundly deaf and almost blind, brought a claim against the Defendant, his attorney, to set aside a transfer of property on the basis that the transfer was fraught with undue influence. The Court held that the circumstances gave rise to the presumption which was not rebutted by the attorney and a judgement was entered for the Plaintiff. See also *Watson v Watson* [2002] NSWSC 919 (4 October 2002) where the Defendant withdrew funds and transferred property to his name under power of attorney. The Court was required to consider whether there had been a breach of trust by use of the power of attorney contrary to the deceased's intentions. The Court held that the Defendant's actions were contrary to the intentions of the deceased. See also *Law Society of New South Wales v Walsh* [1997] NSWCA185 (15 December 1997) where a legal practitioner abused his appointment as an attorney for his mother. The court was required to consider whether the attorney's conduct justified a finding by the Law Society of New South Wales that the practitioner was not of good fame and character. The court found that the legal practitioner's conduct was unsatisfactory and was unfit to practice.

¹²⁸ Rosslyn Monro, 'Elder Abuse and Legal Remedies: Practical Realities?' (2002) 81 *Reform* 42, 45.

¹²⁹ Denis Ong, 'Breach of Fiduciary Duty: The Alternative Remedies' (1999) 11(2) *Bond Law Review* 336, 337.

- (b) the attorney holds any such gains on constructive trust for the benefit of the principal;¹³⁰
- (c) an account of profits or equitable damages and compensation for a breach of fiduciary duties by the attorney;¹³¹ and/or
- (d) restitution is payable to the principal despite any gain.¹³²

Notwithstanding the potential outcome of redress, the pursuit of the common law remedies remains largely theoretical. The commencement of any of legal action is often impracticable given the standard of proof required¹³³ and evidential difficulties, which arise where the claimant is frail or has cognitive difficulties notwithstanding the potential outcome of redress.¹³⁴ There may also be a number of personal matters such as ethnicity, language, gender and social isolation which may prevent those affected in pursuing the available remedies. This is particularly for many people in aged care facilities who are without a strong support network.¹³⁵ The ‘at risk’ group are ‘virtually prisoners of their infirmity and may not have an emotional or cognitive awareness that would motivate them to take action to protect their legal rights or interests’.¹³⁶ Their impairment may also impede their ability to travel to the offices of a legal practitioner for advice or support.¹³⁷

Further, the inherently costly nature of litigation is a major deterrent and diminishes the prospect of recovery through private means.¹³⁸ In many circumstances, by the time victims become aware of these issues their life savings and lifelong family home have been lost leaving them simply unable to fund any proposed litigation.¹³⁹ What is more, is that simply obtaining preliminary private legal advice is usually beyond an older person’s financial

¹³⁰ *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137. In *Turner v Dunne* [1996] QCA 272 (20 August 1996) [4] - [5], the Court of Appeal stated that unconscionable conduct is a principle that may be applied is that which restores to a party contributions made to a joint endeavour which fails, when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them.

¹³¹ *Spina v Conran Associates Pty Ltd* [2008] NSWSC 326 (14 April 2008) [64] – [98].

¹³² *Lake v Crawford* [2010] NSWSC 232 (31 March 2010) [22] – [32] where the Plaintiff pleaded a claim based on restitution arising from the Defendant’s alleged undue influence which was stated to apply to dispositions of property by holders of the legal and beneficial interest. See *Quek v Beggs* (1990) 5 BPR 11, 761.

¹³³ *Street v Ladini* [2012] QSC 009 (6 February 2012) where an application was made by elderly pensioners seeking an order that the Respondents be stopped from exercising their rights under an agreement on the basis it was procured unconscionably. The Application was dismissed. See *Christodoulou v Christodoulou* [2009] VSC 583 (14 December 2009) where an application was made to set aside a transfer of land between an elderly mother and son on the basis that it was procured by undue influence and or unconscionable conduct. The unconscionable conduct was not established and the application was dismissed. See also *Anthony v Vaclav* [2009] VSC 357 (31 August 2009) where an application was brought to enforce a contract against the Respondent, an elderly widow, who sold her house to the Applicant handyman after receipt of independent advice from a solicitor. The application was granted as the Respondent had failed to establish undue influence.

¹³⁴ Council on the Ageing (SA) Incorporated, Submission No 77 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 12 December 2006, 8; New South Wales Ministerial Advisory Committee on Ageing, Submission No 103 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 7 June 2007, 2. See Office of Senior Victorians, ‘The Mismanagement and Misappropriation of Older People’s Assets: How can the Financial Service Sector help?’ (Discussion Paper, Office of Senior Victorians, 3 November 2005) 9.

¹³⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 10, 167 [5.4].

¹³⁶ Aged Care Crisis, Submission No 86 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 30 November 2006, 7-8.

¹³⁷ Aged Care Crisis, above n 136, 7.

¹³⁸ Cheryl Tilse et al, ‘Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice’ (2002) 1 *Elder Law Review* 34, 35.

¹³⁹ Johnson, above n 85, 5.

means and the abusers are well aware of that fact.¹⁴⁰ Given the improvident circumstances that older people find themselves in, the risk therefore of an unsuccessful legal action is often too great.¹⁴¹

In any event, the complexity of the laws which attempt to address the financial abuse of the elderly would require assessment by an experienced legal practitioner. The commencement of legal action presupposes that ‘victims are aware that the activity is fraudulent and that they have recourse through common law, criminal or civil jurisdictions’.¹⁴² Further, where the victim dies, the responsibility of commencing any such action to reclaim the assets rests with the executor of the estate. This process becomes particularly problematic ‘when the executor and the attorney are one in the same’.¹⁴³ It is uncertain as to whether the common law remedies are an adequate means of recovering funds that have been misappropriated given the impracticality of their pursuit.¹⁴⁴

C Criminal Remedies

There is no specific offence of elder abuse which currently exists in any state or territory criminal code that deals with financial exploitation through an EPA. Financial abuse of the elderly is generally prosecuted through a variety of property offences which include misappropriation of property,¹⁴⁵ theft,¹⁴⁶ or fraud¹⁴⁷ – all of which apply to the general population despite their age. However, Vic and the ACT maintain a separate offence for dishonestly obtaining a financial advantage by deception.¹⁴⁸ In the absence of any direct criminal offences, this offence appears to be the closest that comes to criminalising such behaviour in Australia. Additionally, none of the relevant legislation which governs the

¹⁴⁰ Name Withheld, Submission No 13 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 14 November 2006, 3. See House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 10, 162 [5.20]. See also Transcript of Evidence of Ms Margaret Jones, Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 14 May 2007, 21 who stated that ‘all of us at this age are on the age pension, an income of something like \$37 each day. We certainly cannot afford a private solicitor so we are dependent upon the free services of the community legal centres and the others that are available’.

¹⁴¹ Monro, above n 128, 44.

¹⁴² New South Wales Ministerial Advisory Committee on Ageing, above n 134, 2. See particularly Margaret Brown and Suzanne Jarrad, ‘Putting “The Powers” in Place: Barriers for People with Memory Loss in Planning for the Future’ (2008) 15 *Journal of Law and Medicine* 530, 531.

¹⁴³ David Davis, ‘Protecting Elderly Victims of Economic Crime’ (2007) 81(9) *Law Institute Journal* 46, 47.

¹⁴⁴ Fiona Burns, ‘The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia’ (2003) 29(2) *Monash University Law Review* 338, 349.

¹⁴⁵ *Criminal Code 2002* (ACT) s 326; *Crimes Act 1958* (Vic) s 81(1). There is overlap between the offences of theft in Victoria and the Australian Capital Territory and obtaining property by deception.

¹⁴⁶ *Criminal Code Act 1899* (Qld) s 398; *Criminal Code Act 1913* (WA) s 378. *Criminal Code Act 1924* (Tas) s 226(2)(b); *Criminal Code Act* (NT) s 209(1); *Crimes Act 1900* (NSW) s 117; *Criminal Code 2002* (ACT) s 308; *Criminal Law Consolidation Act 1935* (SA) s 134; *Crimes Act 1958* (Vic) s 72(2).

¹⁴⁷ *Criminal Code Act 1899* (Qld) s 408C; *Criminal Code* (WA) s 409; *Criminal Code Act 1924* (Tas) s 255A; *Criminal Code Act* (NT) s 227; *Crimes Act 1900* (NSW) ss 129B - D; *Criminal Code 2002* (ACT) s 326; *Criminal Law Consolidation Act 1935* (SA) s 134; *Crimes Act 1958* (Vic) ss 14, 72. See *R v Naidu* [2008] QCA 130 (30 May 2008) where financial abuse was prosecuted as fraud. In that case, the Appellant was convicted at trial of two counts of fraud for receiving over \$370 000 by way of gifts from the victim who was aged in his late 70s and suffered from dementia. An appeal against the conviction was dismissed.

¹⁴⁸ *Criminal Code 2002* (ACT) s 332; *Crimes Act 1958* (Vic) s 82(1). See also Alex Steel, ‘Money for Nothing, Cheques for Free? The Meaning of ‘Financial Advantage’ in Fraud Offences’ (2007) 31 *Melbourne University Law Review* 201, 207 who, alarmingly, notes that through data collated by the Court Services by the Victorian Department of Justice has identified that between 2002 and 2005 approximately 1004 people were either charged/convicted in respect of obtaining financial advantage by deception.

administration of penalties and sentences makes reference to the ‘advanced age of a victim or the impaired capacity of a victim which a court must have regard to when sentencing an offender’.¹⁴⁹ Reform of the existing law must be accepted if dishonesty against the elderly is not, in many cases, to go unpunished.¹⁵⁰

The penalties imposed for any of the criminal offences mentioned *may* result in imprisonment; the maximum term varies between jurisdictions.¹⁵¹ Unfortunately, there has been noted failure by police to investigate and subsequently prosecute in cases where family have deprived an older person of his or her assets.¹⁵² In circumstances where prosecutions occur, they are inherently difficult and the penalties imposed are often minimal.

While all states and territories maintain legislation for criminal conduct¹⁵³ their pursuit is largely unattractive given that ‘financial abuse of older people usually occurs in the context of a relationship of trust’.¹⁵⁴ The unwillingness to act has been said to have generated from the fear of the abuser being criminally disciplined, retaliation by the abuser and fear that taking such action will ultimately lead to being placed in isolation in a nursing home or some other institutionalised aged-care setting.¹⁵⁵

Given the strong desire by older persons to maintain family privacy, financial exploitation is often unreported.¹⁵⁶ The EPA instrument is a powerful instrument as it ‘can be used quite indiscriminately...by people if they want to steal or otherwise take money away from people without anybody else necessarily picking that up’.¹⁵⁷ As such, the reporting of such abuse is reliant on the detection of misuse of an EPA which is inherently difficult.¹⁵⁸

¹⁴⁹ Queensland Law Society and Office of the Public Advocate, ‘Elder Abuse: How Well Does the Law in Queensland Cope?’ (Report, Queensland Law Society and Office of the Public Advocate, June 2010) 15. See, eg, *Penalties and Sentences Act 1992* (QLD) s 9.

¹⁵⁰ Dirk Meure, ‘Weinberg, M S and Williams, C R: The Australian Law of Theft’ (1978) 2(4) *University of New South Wales Law Journal* 405, 407-408.

¹⁵¹ See, eg, *Crimes Act 1900* (NSW) s 117; *Crimes Act 1958* (Vic) s 74. In New South Wales, a person found guilty of larceny in New South Wales could be liable to imprisonment for up to five years. Whereas in Victoria, a person found guilty of theft may be liable to imprisonment for a maximum of 10 years.

¹⁵² Queensland Office of the Public Advocate, Submission No 76 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 5 December 2006, 4, which states that “the police are unwilling to even investigate allegations of fraud under the amount of \$500,000”. See also Elder Abuse Prevention Unit, Submission No 97 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 13 December 2006, 6, which had reported that through its helpline ‘most callers in these situations have been advised by police to take legal action i.e. sue the son or daughter as the weight of evidence is less’.

¹⁵³ See, eg, *Criminal Code Act 1913* (WA) s 378. There appears to be significant obstacles in relation to the prosecution of elder abuse. See Sue Ellery, ‘Behind Closed Doors: Elder Abuse in Western Australia’ (Discussion Paper, Western Australia Labor, November 2011) 8.

¹⁵⁴ University of Queensland, Submission No 26 to Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 27 November 2006, 3; Queensland Law Society, ‘Joint Issues Paper: Elder Abuse’ (Report, Queensland Law Society, June 2011) 6.

¹⁵⁵ Lori Stiegel, ‘The Changing Role of the Courts in Elder-Abuse Cases’ (2000) 24(2) *Generations* 59, 60. See also Clare, Blundell and Clare, above n 4, 44. See also Les Jackson, ‘Elder Abuse and Queensland Legislation’ (2003) 2 *Elder Law Review* 1.

¹⁵⁶ David Cripps et al, ‘Abuse of Older People: Issues for Lawyers’ (2002) 1 *Elder Law Review* 14, 15-17. See Michael Tueth, ‘Exposing Financial Exploitation of Impaired Elderly Persons (2000) 8(2) *The American Journal of Geriatric Psychiatry* 104, 108; Barbara Hamilton, ‘Be Nice to Your Parents: or Else!’ (2006) 4 *Elder Law Review* 1, 3.

¹⁵⁷ Clare, Blundell and Clare, above n 4, 54.

¹⁵⁸ This is particularly as there is no formal regime which regulates or adequately monitors the appointment and use of an EPA.

VI APPROACH TO REFORM TO PREVENT MISUSE OF EPAS

While there has been some recent recognition of the significant risks involved in the appointment of an EPA of older Australians,¹⁵⁹ urgent reform is required to increase detection to minimise the risk of blatant financial abuse of an EPA. In response, the author proposes five key recommendations to guide the development of preventing and responding to financial abuse of older people in Australia:

A National Legislation for EPAs

There fails to be any specific legal framework targeted at the financial abuse of older Australians.¹⁶⁰ A national legal framework, which regulates the appointment and use of EPAs, is required so that a more informed, consistent and cost effective approach to elder abuse is developed.¹⁶¹ This is necessary as the existing laws are inadequate in terms of the kinds of harms they address and the consequences of the adverse conduct.¹⁶² The Commonwealth Government's powers are limited by the Australian Constitution, which does not confer on them a specific power to legislate with respect to the objectives of elder financial abuse. However, the Commonwealth Government may have the power by virtue of section 51(xxix) of the Constitution¹⁶³ to achieving national consistency on this issue. The external affairs power is, however, limited in scope as it must be an appropriate means of giving effect to the object of a relevant international treaty or agreement and would require judicial determination of this constitutional issue.¹⁶⁴ Notwithstanding, as elder abuse is a pervading global concern, the external affairs power may very well extend to 'matters of international concern'.¹⁶⁵ There is also the option for the Commonwealth to make laws with respect to matters referred to it by the states.¹⁶⁶ For this option to be effective all the states including the territory would need to agree to refer their powers so that a national scheme could be developed. Difficulties may, however, arise as to which bureaucracy would be responsible for regulation of this national legislation.¹⁶⁷

¹⁵⁹ In 2007, the Australian federal government introduced specific legislation and responses to residential aged care facilities and the House of Representatives Legal and Constitutional Standing Committee published a comprehensive report highlighting the issues faced by older people and specifically financial abuse and fraud involving a power of attorney. Since that time, however, there has been no substantive change to the laws that regulate enduring powers of attorney generally or specifically for financial matters.

¹⁶⁰ Laura Breedon, 'Elder Abuse and Neglect: Challenges and Directions for Legal Reform' (2010) 8(1) *Journal of Law and Medicine* 19.

¹⁶¹ Jackson, above n 12, 6-7.

¹⁶² Margaret Hall, 'Material Exploitation and the Autonomy Ideal: The Role of Equity Theory in Adult Protection Legislation' (2008) 5(9) *Elder Law Review* 1, 2.

¹⁶³ *Commonwealth of Australia Constitution Act 1900* (Cth).

¹⁶⁴ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 646; *R v Poole; Ex Parte Henry* (No 20) (1939) 61 CLR 364; *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 54, 82, 102, 118, 126, 141. There remains legislative discretion to choose among appropriate means for implementing those obligations: *Commonwealth v Tasmania* (1983) 158 CLR 1, 130-131. See also Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108, 12 August 2008, vol 1, 195 [3.20].

¹⁶⁵ *XYZ v The Commonwealth* (2006) 227 CLR 532, 608 where the High Court stated that it was unnecessary to decide whether the Australian Parliament may make laws with respect to matters of 'international concern' because the Commonwealth could rely on other recognised aspects of the external affairs power to uphold the validity of the legislation under challenge.

¹⁶⁶ *Commonwealth of Australia Constitution Act 1900* (Cth) ss 51(xxxvii), 122.

¹⁶⁷ This is particularly given that ASIC have limited resources. See Clare, Blundell and Clare, above n 4, 4, who suggest an integrated approach across government and non-government organisations, with a government department providing leadership and direction is needed.

B Mandatory Registration of EPAs

In developing the national framework, it is suggested that a mandatory registration of EPAs should be required. The establishment of a central registry is fundamental to the effective use and management of any enduring appointment. It will also enable the verification of the holder of the instrument to encourage accountability and deter abuse.¹⁶⁸ Without a formal registration process, there is a substantial risk that financial abuse will continue undetected in many cases.

C Standardised Statutory Approved EPA Form

A standardised statutory approved EPA form is absolutely necessary in ensuring a safer and consistent framework for all.¹⁶⁹ The form should be available in a central, easy to find location¹⁷⁰ and should set out in precise detail the statutory obligations that govern their use along with the possible civil and criminal consequences for misuse. This is juxtaposed by the current process which, in accepting an appointment, requires an attorney to apply a rather tokenistic approach to quite onerous statutory obligations.¹⁷¹ As a practical recommendation, it is also suggested that the EPA form should be clear and contain a boxed example that:¹⁷²

Any person who dishonestly or deceptively obtains any assets including monies from an elderly person through the use of this document without legal justification may be considered to have committed a criminal offence and prosecuted.

It is also suggested that the boxed example should be clear as to the maximum penalty as imprisonment.

D Mandatory Reporting by Donees

The recognised challenge for banks, other financial institutions and service providers is to identify the financial abuse and then to appropriately report it or locate someone who is prepared to bring it to the attention to the relevant authorities.¹⁷³ In order to increase detection and reporting of abuse, a mandatory reporting regime should be introduced requiring donees to frequently demonstrate their compliance with the statutory obligations.¹⁷⁴ This will also ensure that the attorney is fulfilling their role in accordance with the legislative

¹⁶⁸ John Chesterman, 'Reforming Powers of Attorney Laws' (2010) 84(12) *Law Institute Journal* 68.

¹⁶⁹ Deanne Loonin and Elizabeth Renuart, 'Symposium: the Middle Class Crunch: the Life and Debt Cycle: the Growing Debt Burdens of Older Consumers and Related Policy Recommendations' (2007) 44 *Harvard Journal of Legislation* 167, 196.

¹⁷⁰ It is suggested that the enduring power of attorney forms should be made available either electronically or through the state and territory government departments. See Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney*, Report (2010) 63.

¹⁷¹ By way of example, the Statutory Approved Form in Queensland requires the attorney to agree that they will exercise their powers 'in accordance with the *Powers of Attorney Act 1998* and the *Guardianship and Administration Act 2000*'. It is difficult to see how a non-lawyer would be able to appropriately understand the extent of these obligations.

¹⁷² Queensland Law Society, above n 154, 10.

¹⁷³ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 10, 40-43 [2.101]-[2.112].

¹⁷⁴ Loddon Campaspe Community Legal Centre, 'Financial and Consumer Credit Issues for Older Consumers in Central Victoria' (Report, April 2008) 8. It is suggested that a random audit should be conducted of those registered as enduring powers of attorney.

requirements¹⁷⁵ and allow the use of the document to be regularly monitored and encourage greater transparency, protection and reporting of abuse.¹⁷⁶ It is proposed that a state government body absorb the responsibility to supervise the appointments to safeguard the donor's long term financial management.¹⁷⁷ There may however, again, be bureaucratic tendencies which may stifle the acceptance of this proposal.¹⁷⁸

Coupled with this recommendation is the requirement to develop and implement well-resourced social programs and services to assist service providers in identifying and reporting instances of abuse (particularly those working in the first line of defence).¹⁷⁹ Further, greater public awareness is needed to expose the disgraceful and shameful acts of those attorneys who take advantage of the vulnerable in this way.¹⁸⁰

E Criminalising Financial Elder Abuse

The laws dealing with elder financial abuse through enduring documents EPA seems to deal with these issues in a rather roundabout way. It is suggested that donees who dishonestly and deceptively abuse vulnerable elderly persons to gain a financial self-interest should be subject to prosecution at the fullest extent. Stronger and specific laws are required to adequately address the severity of this crime.¹⁸¹ To overcome the inherent difficulties associated in the prosecution of financial abuse of the elderly, it is suggested that a general offence for the misappropriation of assets should be introduced in all states and territory corresponding criminal codes.¹⁸² Criminalising such behaviour will facilitate greater accountability and serve as a form of prevention of financial exploitation of elders. While there are divergent views as to the utility of this proposal, it is the author's view that mere restorative practices of reintegrative shaming or an apology¹⁸³ is not sufficient and may even trivialise the offence.¹⁸⁴

VII CONCLUSION

Financial abuse of older Australians through EPAs has emerged as a severe legal and social concern.¹⁸⁵ It has serious personal, economic and social ramifications for the individual concerned and the community.¹⁸⁶ A validly executed EPA empowers a donee to, amongst other things, manage the financial affairs of a donor even after the donor becomes mentally incapable of doing so. While the appointment process involves a number of safeguards, each

¹⁷⁵ Sappideen and Field, above n 53, 24.

¹⁷⁶ Linda Starr, 'Elder Abuse – A Global Issue: An Australian Response' (Paper presented at the Greek Conference Corfu, Greece, 2009) 9.

¹⁷⁷ Peter Whitehead, 'Empowerment and Protection in the 21st Century' (2006) 4 *Elder Law Review* 1.

¹⁷⁸ See Rachel Kent, 'Misuse of Enduring Powers of Attorney' (2003) 34(3) *Victoria University of Wellington Law Review* 497, 519.

¹⁷⁹ Cheryl Hastie, 'Progress in the Fight against Elder Abuse' (2004) 3(8) *Elder Law Review* 1. See Carney, above n 71, 484, 487.

¹⁸⁰ Russell Grenning, 'Guarding the Vulnerable' (2006) 26(4) *Proctor* 17, 20.

¹⁸¹ Roslyn Monro, 'Elder Abuse and Legislative Remedies: Practical Realities' (2002) 81 *Reform* 42, 43.

¹⁸² Queensland Law Society, above n 154, 10.

¹⁸³ Kristina Barisic, 'Perpetrators of Elder Abuse: The Role of Shame and the Appropriateness of a Restorative Approach' (Report, Macquarie University) 9.

¹⁸⁴ See generally Ruth Lewis et al, 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10(1) *Social and Legal Studies* 105, 109-130.

¹⁸⁵ Sanders, above n 12, 2. See also Law Reform Commission of Saskatchewan, above n 12, 10.

¹⁸⁶ Brian Herd and Michelle Howard, 'Elder Abuse: How Well Does the Law in Queensland Cope?', *Australian Policy Online* (online), 14 July 2010 <<http://apo.org.au/research/elder-abuse-how-well-does-law-queensland-cope>>.

state operates individually in respect to the appointment of enduring attorneys. These ‘protections’ do not, however, go far enough to prevent financial abuse from occurring. The unregulated and unsupervised approach to the appointment has created an opportunity for persons to financially exploit the elderly.¹⁸⁷ The state and territory tribunals and courts have the supervisory role in determining the validity of EPAs and cancellation of the power in circumstances where there has been an abuse, fraud or undue influence was used to create the power. The practical reality is that the current regime fails to adequately address the perceived gaps. The equitable principles relating to relief against unconscionable dealing, the principles relating to undue influence, along with breach of a fiduciary duty, may be applied in circumstances where an older person has been exploited financially.¹⁸⁸ While there has been some recognition of the limited remedies, improvements need to be made to empower the elderly by focussing on the abusers and enforcing stronger laws. As a result of the haphazard approach to appointment there has been pronounced difficulty in determining the actual number of incidents of financial abuse. A nationally consistent approach should be considered a priority to address the increasing complexity of elder financial abuse.¹⁸⁹

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¹⁸⁷ Monro, above n 181, 43.

¹⁸⁸ John Heydon and Patricia Loughlan, *Equity and Trusts: Cases and Materials* (Butterworths Law, 5th ed, 1998) 303.

¹⁸⁹ Johnson, above n 85, 8.

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