Tuesday, 11 June 2024

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

Delivered via email: corporations.joint@aph.gov.au

Dear Sir/Madam,

Re: Financial Services Regulatory Framework in Relation to Financial Abuse

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to comment on the above inquiry. It would be our preference that this inquiry would never be necessary, however the hard facts are that we consider this inquiry to be essential.

We represent over 136,000 professional members in Australia and New Zealand. Many of our members working in a wide range of businesses throughout Australia have a 'front row seat' on financial abuse matters especially for their older clients.

Our comments below are limited to the definitions of financial abuse in relation to the questions asked in the Terms of Reference.

Defining financial abuse

Based on our limited research we have found two definitions of financial abuse that elicit different aspects of the problem.

The Australian Law Reform Commission defined financial abuse in the following way (*Elder Abuse – A National Legal Response – Final Report* (May 2017):

> *Financial abuse appears to be the other most common type of elder abuse, accounting for over a third of the calls that reported abuse to the Victorian helpline. Common types of financial abuse were: someone incurring bills for which the older person is responsible; someone living in the older person's home for reasons other than for the benefit of the older person; someone stealing the older person's goods; 'threatening, coercing or forcing an older person into handing over an asset'; and abusing power of attorney arrangements.*

The US study found that spending money without permission, forging signatures, and forcing someone to sign something, were commonly reported types of financial elder abuse.

Other behaviours that may, in some circumstances, be financial abuse include: refusing to repay a loan; living with someone without helping to pay for expenses; failing to care for someone, after agreeing to do so, in exchange for money or property; and forcing someone to sign a will, contract or power of attorney instrument.[1]

A KPMG report prepared for the Department of Prime Minister and Cabinet in July 2020[2] references financial abuse in the following ways:

1. During a relationship

Table 2: Summary of Sharps-Jeffs' the technology of financial abuse

Financial Control	Financial exploitation	Financial sabotage
• Access to bank accounts • Taking income/ financial resources • Giving an allowance	• Generating debt • Coerced debt through fraud • Coerced debt through force • Coerced debt through misinformation • Benefit fraud • Refusal to contribute	• Preventing women from getting a job • Preventing women from keeping a job • Sabotaging visa arrangements or sponsorship

Source Sharp-Jeffs, N. 2015. A Review of Research and Policy on Financial Abuse within Intimate Partner Relationships. London Metropolitan University, pages 9-13

2. Post separation abuse

Financial abuse often escalates and may continue for extended periods of time following separation. Common behaviours which constitute financial abuse and are associated with separation include:

- Intentionally delaying family law property proceedings or negotiations. Tactics may include failing to attend, failing to respond, refusing to negotiate, non-disclosure of assets, signing forms incorrectly and vexatious litigation
- Failing to pay joint debts
- Failure to disclose assets. Parties have a disclosure obligation to provide full and frank disclosure of all information relevant to the matter, including assets. Non-disclosure may impact the just and equitable division of property
- Refusal to pay child support.

3. Dowry abuse - reports note that there is little data available to date on the extent of dowry abuse in Australia.

[1] https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/, p. 42
[2] Preventing the financial abuse of women: literature and desktop review, KPMG 2020. Sections 2.1.2 and 2.1.4

There are clearly similarities in the above. Our conclusion from the above is that the definition of financial abuse is different depending on a person's age and their circumstances. It is important to acknowledge that financial abuse is not the same for everyone.

Is financial abuse different from economic abuse?

As a logical level it would appear reasonable to assume that economic abuse would have a wider definition than financial abuse. To borrow from mathematical terms, normally we would not consider these terms to be commutative. Indeed, it would often be assumed that financial abuse will always have economic abuse for an individual but it may not necessarily be the other way around.

The KPMG report mentioned above sought to review the literature relating to existing approaches to addressing financial abuse of women. The report found: "that the terms 'economic abuse' and 'financial abuse' are largely used interchangeably. Although there were some claims that the term 'economic abuse' referred to a broader range of behaviours outside of immediate cash flow and finances…"[3]

Are family domestic and sexual violence (FDSV) associated with financial abuse?

Based on an April 2024 Australian Institute of Health and Welfare Report[4] (AIHW report), we would conclude that at the least FDSV is an indirect cause of financial abuse and may often be a direct cause of financial abuse.

The AIHW report notes from an Australian Bureau of Statistics report for 2021/22 that 1.3 million women suffered from partner violence. Of those about 46% (597,000) left their home and when leaving did not take property and other assets with them.

This report notes that many women who fled from partner violence returned "because they had no money or financial support" with some saying, "they had nowhere else to go".

Single mothers who had separated often suffered from a number of financial worries including cash flow problems. Economic and financial impacts of violence can also be experienced through changes to a person's housing situation or housing security.

The AIHW report notes that FDSV economic impacts can be lifelong. The report states that, "children who experience violence may have impaired social, emotional, and educational functioning, which can be seen later in life by looking at main sources of income, their experiences of financial stress and reduced economic security". It further notes that, "people who were abused as children were more likely to receive a government pension, benefit or allowance".

[3] ibid, Section 2.1.1
[4] https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/economic-financial-impacts

The AIHW report also notes that "women across different age cohorts were 30–45% more likely to experience high financial stress if they had experienced sexual violence, compared with those had not experienced sexual violence".

Taken as a whole, we have concluded that in many cases FDSV is a direct and indirect cause of financial abuse.

Early access to super for those suffering from financial abuse

In February 2012 the Australian Law Reform Commission published its final report *Family Violence and Commonwealth Laws—Improving Legal Frameworks*[5] which made a number of recommendations about those suffering from family violence being able to access superannuation balances.

In this report the ALRC stated that family violence victim's "may be coerced into taking action that relinquishes some control over, or access to, his or her superannuation".

This may include the forced splitting of contributions under Division 6.7 of the *Superannuation Industry (Supervision) Regulations*. The ALRC suggested that the government should review superannuation laws in relation to family violence.

The ALRC also recommended that the superannuation "financial hardship" early access rule should be improved by making the qualifying period of Commonwealth government handouts 26 weeks out of a 40 week period instead of the existing continuous 26 week period.

In relation to expanding the early release Compassionate Grounds rules to allow early release of superannuation benefits for withdrawals due to family violence, the ALRC said that it considered such changes were on balance inappropriate. Any such changes would need to be introduced with extreme care.

In December 2017 the then government issued a *Review of an Early Release of Superannuation Benefits - under compassionate and financial hardship grounds and for victims of crime compensation - Consultation Paper* and in June 2018 issued a *Review of Superannuation and Victims of Crime Compensation - Further Consultation and Draft Proposals Paper*.

CAANZ made submissions to both these consultations.

At the time we expressed our support to allow the early release of superannuation benefits for domestic violence sufferers. Our support was conditional on there being insufficient support available from other sources to enable a victim to escape ongoing violence.

We acknowledge that permitting the early release of superannuation benefits in these cases would lead to lower retirement savings. It is our view that it is better to solve the more immediate problems in a person's life especially taking into account the AIHW findings mentioned above (for example that many domestic violence sufferers return to live with a

[5] Family Violence and Commonwealth Laws—Improving Legal Frameworks (ALRC Report 117), 2012.

perpetrator because they have nowhere else to go and insufficient economic resources to survive on their own).

To reduce the potential that such a rule could lead to coercion, strong appropriate safeguards would be essential.

Elder Abuse

CAANZ, often with other professional associations, has made a number of submissions in relation to elder abuse especially in relation to Powers of Attorney – both general and enduring – for inquiries conducted by the Australian Law Reform Commission and the Commonwealth Attorney's General Department (AG's Dept).

Attached to this submission is our most recent response to an AG Department consultation on seeking greater consistency for Enduring Powers of Attorney laws throughout Australia.

Powers of Attorney documents are often very useful and practical documents for individuals and business purposes. However, they often enable financial abuse to occur. Any reforms in these areas needs to take into account the conflicting needs of protecting vulnerable individuals and ensuring the such documents remain practical and cost effective to execute.

Sincerely,

Tony Negline
Superannuation & Financial Services Leader
Chartered Accountants Australia and New Zealand

Appendix A

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 136,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

CA ANZ promotes the Chartered Accountant (CA) designation and high ethical standards, delivers world-class services and life-long education to members and advocates for the public good. We protect the reputation of the designation by ensuring members continue to comply with a code of ethics, backed by a robust discipline process. We also monitor Chartered Accountants who offer services directly to the public.

Our flagship CA Program, the pathway to becoming a Chartered Accountant, combines rigorous education with practical experience. Ongoing professional development helps members shape business decisions and remain relevant in a changing world.

We actively engage with governments, regulators and standard-setters on behalf of members and the profession to advocate in the public interest. Our thought leadership promotes prosperity in Australia and New Zealand.

Our support of the profession extends to affiliations with international accounting organisations.

We are a member of the International Federation of Accountants and are connected globally through Chartered Accountants Worldwide and the Global Accounting Alliance. Chartered Accountants Worldwide brings together members of 13 chartered accounting institutes to create a community of more than 1.8 million Chartered Accountants and students in more than 190 countries. CA ANZ is a founding member of the Global Accounting Alliance which is made up of 10 leading accounting bodies that together promote quality services, share information and collaborate on important international issues.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents more than 870,000 current and next generation accounting professionals across 179 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications.

Attachment

13 December 2023

Attorney-General's Department

Attn: Protecting the Rights of Older Australians Section

3-5 National Circuit

CANBERRA ACT 2600

Email: EPOAConsultation@ag.gov.au

Dear Sir/Madam,

RE: ACHIEVING GREATER CONSISTENCY IN LAWS FOR FINANCIAL ENDURING POWERS OF ATTORNEY – CONSULTATION PAPER

Chartered Accountants Australia and New Zealand, CPA Australia, Institute of Public Accountants and the SMSF Association (together, the Joint Bodies) write to you as the peak professional accounting and tax profession sector and financial advisers. The Joint Bodies welcome the opportunity to make a submission to the **Consultation Paper**). Attorney-General's Department in relation to the consultation paper titled 'Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney' (**Consultation Paper**).

We thank the Attorney-General's Department for the additional time granted to participate in this consultation. It has been an extremely busy period of time for consultations. Your understanding in this regard is greatly appreciated.

Broadly, the Joint Bodies would welcome measures that seek to improve the harmonisation of the operation of the enduring powers of attorney (EPOA) legislative framework across the state and territory jurisdictions, improve accessibility and simplicity, whilst balancing vital protections and integrity measures.

We acknowledge that general powers of attorney's (GPOA) and medical powers of attorneys (MPOA) are out of scope of this review. However, there are crucial elements of this consultation which have relevancy, and a strong alignment to these other attorney relationships. Issues on the operation of the respective powers are important given the gravity of the decision making involved and the potential for the attorney to have a conflict of interest and not necessarily act in the principal's best interest. Who can be appointed an attorney should similarly be considered. Greater consistency should be applied across each of the three power of attorney instruments in these areas.

Our detailed response to the consultation paper questions can be found in **Appendix A**.

If you would like to discuss any of the above, please contact Tony Negline, Superannuation & Financial Services Leader, on (02) 8078 5404.

Yours faithfully,

Tony Negline
Superannuation & Financial Services Leader
Chartered Accountants Australia and New Zealand

Ram Subramanian,
Interim Head of Policy and Advocacy
Learning and Innovation
CPA Australia

Tony Greco
General Manager Technical Policy
Institute of Public Accountants

Tracey Scotchbrook
Head of Policy and Advocacy
SMSF Association

Appendix 1 - EPOA consultation questions

Execution of Enduring Powers of Attorney (EPOA)

1. A model provision could comprise the following elements:

- **An EPOA must be in the approved or prescribed form, or in a substantially similar form**
- **An EPOA must be signed and dated by the principal, or by another person at the principal's direction, in the presence of an authorised witness**
- **An EPOA must be signed and dated by the authorised witness in the presence of the principal (and, if applicable, in the presence of the person who signed at the principal's direction).**

Comment

We support the provision for a standardised/prescribed form, but this must also be able to support non-standard arrangements

Witnessing arrangements in relation to principals

1. Is it practical (for principals, attorneys and witnesses) for a model provision to:

- **require at least one authorised witness to an EPOA, and to retain jurisdiction-specific approaches to the number of witnesses required**
- **retain jurisdiction-specific qualifications requirements for the required authorised witness?**
- **Alternatively, if you consider it appropriate that there is a consistent approach across jurisdictions in relation to the prescribed class of persons who may act as authorised witnesses, what qualifications should that class of witness be required to hold?**

Comment There is a concern regarding the potential increase in costs associated with executing an EPOA. EPOAs are typically executed by wealthier segments of the population, and any additional costs would disproportionately burden those who are less well-off, making it even more challenging for them to seek advice.

Another point pertains to the support requirements for at least one authorised witness, which we would generally endorse. The consensus leans towards determining who can serve as authorised witnesses at a state or territory level. Additionally, we generally support the proposed common restrictions and the ability to specify individuals who cannot be authorised witnesses. It is acknowledged, however, that the latter is often implied in most jurisdictions.

Finally, the framework must ensure that advice and authorised witnesses are accessible across jurisdictions. An approach which allows jurisdictions to determine what is appropriate for each jurisdiction will ensure that local situations are considered appropriately.

2. Feedback is sought on whether your experience of the witnessing requirements for financial EPOAs, as they apply in your jurisdiction, appropriately balance factors such as accessibility, with providing appropriate protection and assistance to principals.

Comment

Across all jurisdictions, we contend that there is a need for harmonised measures to ensure the provision of suitable protections and assistance to principals, while concurrently facilitating accessibility.

However, we raise certain queries in regard to this. Firstly, we question whether the stipulation for qualifications for witnesses creates inconsistency with the principle that states and territories have the authority to determine who is eligible to witness. It prompts consideration of aligning this requirement with the criteria for individuals authorised to witness wills or certify documents. Such alignment could contribute to a more coherent and streamlined approach within the legal framework.

3. Feedback is sought on the proposed establishment of prescribed information resources, which witnesses would draw to the attention of a principal. What matters do you consider should be addressed in the proposed prescribed information?

Comment

We consider that there are a wide range of information that will need to be kept up to date, including (but not limited to):

- When and how an EPOA can be executed
- How to limit the attorney's powers
- What sort of person you should appoint as your attorney
- What type of attorney decision-making would work best: unanimous; majority; or anyone can act?
- Advantages and disadvantages of having more than one attorney, together with discussion of agreement mechanisms including majority or unanimity of decision-making
- How problems can arise and be remedied
- Whether the powers of the attorney(s) should be limited
- Whether an EPOA would only take effect once certain events have occurred – e.g. loss of capacity – and how that is to be determined
- Multiple EPOAs
- How to guard against elder abuse
- How to recover losses caused by actions where an attorney may have acted illegally or in conflict

4. Feedback is sought on the obligations proposed for authorised witnesses, and the model of having differing requirements for different types of authorised witnesses (such as Australian legal practitioners).

Comment

We agree that obligations should be placed on the witness; we agree that there should be a list of issues that they must discuss with the principal before an EPOA is executed. We would prefer this list to be open-ended.

We also raise the following questions:

- Is there a downside for a situation where a principal in one jurisdiction where there are less controls over the requirements of authorised witnesses compared to another where witnesses have more stringent requirements?
- Given the aspirational nature of model provisions, is it appropriate to assume that even authorised witnesses who are legal practitioners are providing all necessary information to principals, and would it not provide a better standard of care to ensure that all witnesses are able to provide the same level of assistance?

Acceptance of appointment by an attorney

1. **Feedback is sought on the benefits and feasibility of establishing a single national attorney acceptance form.**

Comment

We question whether it would be feasible to have a single acceptance form, if the EPOA rules are not similarly unified.

2. **Would the proposed role(s) for the authorised witness provide an appropriate degree of assurance that the attorney understands the obligations of their appointment?**

Comment

We would expect this to be the case except in cases where collusion may be evident.

3. **What matters do you consider should be addressed in the proposed prescribed information?**

Comment

At a minimum, we consider that prescribed information must discuss in plain English (as well as other languages) the duties and obligations of the attorney including the potential for redress if they act illegally or in conflict with the best interests of the principal.

4. **Does the proposed approach sufficiently account for situations where**

   a. an EPOA needs to be put in place urgently and/or

   b. for attorneys to accept their appointment, where the attorney may be overseas or interstate?

Comment

We believe that adhering to ordinary requirements in the case of urgent EPOAs can be an impediment but note that ordinary protections are a necessary balance. However, we believe that there may be cases where requirements can be mitigated due to urgency (for example, execution of documents before urgent major surgery).

We believe that for situations such as these, execution via electronic means should be available. Recent changes to the execution of statutory declarations (Federal) on the enactment of the *Statutory Declarations Amendment Bill 2023*, provides a useful example and an appropriate framework. For consistency, similar measures should be adopted for EPOAs.

The concept of combining trustworthiness with a confirmed willingness to act as an attorney holds appeal. However, there is a need for additional clarification, especially in the context of medical Enduring Powers of Attorney (EPOAs), which fall outside the scope of this consultation. The seriousness of these documents prompts consideration of whether aligning financial EPOAs with medical counterparts is crucial. While the gravity of medical decisions may not have a direct parallel in financial EPOAs, the rationale for distinct witness requirements in the case of both types of EPOAs should remain protection of the principal.

Revocation of an EPOA

1. **A risk identified above is that a principal may wish to revoke an EPOA when they are considered (by family members, witnesses or others), not to have decision-making capacity to do so. What qualifications or training requirements (if any) do you recommend are necessary to ensure a witness is able to make a considered determination as to the principal's decision-making capacity in the case of a revocation?**

Comment

We think that there are similar issues which arise when a witness assesses the principal's capacity. EPOAs should only be revoked in agreement with those qualified to act as authorised witnesses.

Additional certainty regarding the revocation of an EPOA in this instance could be provided with the involvement of a doctor or doctors, including a medical specialist, such as what happens in other areas requiring judgement of a principal's medical circumstances.

2. Do the proposed requirements for revocation of an EPOA balance the relevant considerations in relation to:

a. The extent of obligation placed upon the authorised witness, regardless of the qualifications or positions they hold

b. Ensuring a principal is supported to understand the effect of revoking an EPOA

c. Flexibility to accommodate circumstances where urgent revocation is required?

Comment

We believe that the same rules for execution should apply for revocation, meaning that a revocation should effectively be considered a negative EPOA.

3. Are there other suggested elements which would be beneficial to incorporate in a model provision?

Comment

Presently, in most jurisdictions, the revocation of EPOAs requires the location and physical destruction of existing EPOA documents, as well any certified copies which may be in

existence. We believe that there needs to be commentary in the model provisions around how revocation is to occur in practice under these model provisions, given current practices.

4. What do you consider the prescribed information about the revocation of an EPOA should include?

Comment

Guidance regarding revocation of an EPOA should be specified in the same way that execution of an EPOA is specified, noting that it amounts to the reverse of execution.

Automatic revocation of an EPOA

1. **Feedback is sought on whether the range of proposed automatic revocation events are sufficiently clear and identifiable, so as not to create uncertainty about whether an EPOA is revoked.**

Comment

We agree with the suggested automatic revocation situations, including the criteria listed in question 3.

2. **Feedback is sought on the proposal that an EPOA for financial matters would be revoked at such time as a new EPOA for financial matters made by the principal is executed, unless a principal specifies otherwise. An alternative approach is that the earlier EPOA is taken to be revoked to the extent of inconsistency with the later financial EPOA.**

Comment

We prefer the alternative approach but are concerned about the potential for confusion between EPOA documents.

There are a variety of situations where this could potentially be problematic, for example, where a limited EPOA is set up for the purposes of property settlement, it would be impractical for such an arrangement to invalidate existing unlimited EPOAs. It is possible that rules specific to certain types of EPOAs may alleviate such concerns. Also, there may be a need to carve out situations where, for example, multiple family members hold separate EPOAs on behalf of a principal.

It is not uncommon for multiple EPOAs to be needed for different purposes. One may be needed to address an individual's personal affairs. A second may be required where an attorney is to be appointed to act for the principal as trustee (or director where a corporate trustee) of a self managed superannuation fund or other trust instrument. The attorneys for each role may differ. An attorney acting as a trustee of a SMSF must meet the legislative requirements as prescribed in the *Superannuation Industry (Supervision) Act 1993 (Cth),* as they must be appointed as a trustee or director and the donor resign from that role. Further, the EPOA will need to comply with the fund deed and may require the inclusion of conflict clauses or other specific powers (for example, the ability to remake a binding death benefit nomination).

A separate EPOA may be required for property transactions and when dealing with the land titles office in some jurisdictions. They may require the EPOA document to be in a particular form and to be registered with the land titles office in order to be valid and accepted for any

land title dealings. A standard EPOA may be insufficient to satisfy these requirements, including an EPOA that is aged, despite being valid and in force.

3. Certain model laws and inquiry recommendations suggest additional grounds for automatic revocation, where they occur after the execution of an EPOA. Feedback is sought on whether the following events (or other additional events), if occurring after the execution of an EPOA, should be grounds for automatic revocation:

a. an attorney is convicted or found guilty of an offence involving dishonesty

b. an attorney is convicted of an offence involving violence occurring within the principal's family or domestic context

c. an attorney is a person against whom an interim or final family violence intervention or protection order has been made, where the order is relevant to the principal's family or domestic context

d. an attorney becomes bankrupt or personally insolvent.

Comment

As explained in our response to question 1, we agree with the items in this list.

We consider the question of how this will work in practice to be critical. For example, how is the status of the principal known? Also, how will small firms be able to check the veracity of an attorney in a way that does not present the organisation with unacceptable costs?

Another consideration which could be added to this list is how automatic revocation may be able to deal with situations where an attorney is unable to act due to circumstances outside their control, or cannot assume normal duties of an attorney in a reasonable timeframe. An example of this might be where an attorney becomes geographically stranded, incapacitated or becomes uncontactable - voluntarily or involuntarily.

Financial institutions could operate a modified version of existing AML/CTF considerations that many of them may already conduct as part of due diligence, such as bankruptcy and criminal record checks. Other organisations also need to be considered. We are concerned about complexity, cost and time delay for firms or individuals which are not presently required to undertake this sort of checking.

Attorney eligibility

1. **Does the proposed range of attorney duties to be made more nationally consistent give appropriate coverage of safeguards, or should additional duties be incorporated?**

Comment

We support the proposed range of attorney duties.

The attorney should be prepared to acknowledge their obligations when agreeing to act. We would recommend the inclusion of the requirement to keep appropriate records and documentation to the duties listed.

2. Feedback is sought on whether the proposed five-year ineligibility period, is appropriate in each of the following cases. A prospective attorney:

a. has been convicted of an offence involving dishonesty

b. has been convicted of an offence involving violence occurring within the principal's family or domestic context

c. has been the subject of an interim or final family or domestic violence intervention order, where it relates to the principal's domestic or family context

d. is a person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA.

Comment

We consider the five-year ineligibility period is not appropriate as it is not of sufficient duration. A minimum period of seven years would be more appropriate, given the trusted position held by an attorney. This period may be reduced if an appropriate tribunal agrees on examination of the specific facts and circumstances. Expediency of a decision may be required, and the ability to be heard, and receive a decision in a timely and cost-effective manner will be essential.

3. Feedback is sought on whether the proposed disclose and approve approach is appropriate in each of the following cases:

a. a person who has been convicted of an offence involving dishonesty

b. a person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA.

Comment

We do not support this proposal. As noted above, we believe 'disclose and approve' process should be conducted and authorised by an appropriate tribunal only.

We also refer to the proposed grounds for EPOA revocation (refer to chapter 6 of the consultation paper). If the intent of the proposal is to also make these revocations reviewable or appealable, the intent and scope of any review or appeal process will need to be clearly stated. Where the intent is to allow, then this process should be conducted by an appropriate tribunal.

4. Are there circumstances where it would be appropriate for a 'disclose and approach' to apply without a period of time?

Comment

We do not believe that there would be circumstances which would make this appropriate in the absence of a time period being specified.

5. Are there other types of offences, intervention or protection orders or criteria, which should make a person:

a. entirely ineligible for appointment under a financial EPOA, or

b. ineligible for a five year or other period?

Comment

We consider that potential attorneys should be ineligible entirely, if found guilty of any serious indictable offences that carry a minimum jail term of at least 10 years.

Attorney duties

1. **Noting the increasing implementation of supported decision-making across different contexts in Australia, in what circumstances, if any, may substitute decision-making be appropriate under a financial EPOA?**
2. **In what circumstances may it be appropriate for a principal's views, wishes and preferences to be given less weight by an attorney acting under a financial EPOA (such as undue influence, coercion or risk of significant harm)?**

    o Should an attorney be required, in all instances, to follow the views, wishes and preferences of the principal (even if there is a high risk of significant harm to the principal's health or wellbeing)?

3. **Should all types of attorneys (family members/friends, public trustees and private trustee companies) be subject to the same obligations, regardless of their relationship with and access to the principal?**
4. **Is there a particular model law, an approach implemented in a jurisdiction, or an approach recommended in a particular inquiry which you consider provides the best framework to adopt for financial EPOAs?**

Comment

We have no comment regarding the above questions at this time.

Interstate recognition of EPOAs

1. **Could the design of current interstate recognition arrangements for financial EPOA be improved or further simplified from a legislative perspective (that is, could amendment to the wording of interstate recognition clauses be improved)?**

Comment

The status of interstate EPOAs remains unclear and greater clarity is required. Issues can arise where an individual resides in one jurisdiction but holds property or assets in another. Further, the attorney may not reside in the same location as the principal. This can be further complicated where SMSFs are involved, with the underlying trust instrument created in one state, the trustees (including the attorney) located in another, with assets located in a third state.

Greater consistency, certainty and simplicity would therefore be welcomed to remedy these issues.

2. **Feedback is sought on whether your experience of the interstate recognition requirements for financial EPOAs, as they apply in your jurisdiction, are working effectively, or on any challenges you have encountered.**

Comment

The impacts are quite varied and will depend upon the particular circumstances of individual cases and the jurisdictions involved. It remains the case that some entities will not recognise an EPOA executed in another jurisdiction; this may arise because the law in a jurisdiction is not well known. Problems particularly arise where property transactions are involved, and the unique documentation and registration requirements that can apply in different jurisdictions when dealing with the respective land titles office.

3. Are there non-legislative steps which could be taken to assist the interstate recognition of EPOAs? For example, would it assist if further practical guidance was provided about the circumstances in which an EPOA in one State or Territory would be recognised in another, and conversely the circumstances in which interstate recognition may not occur?

Comment

We believe this suggested practical guidance would be very helpful and would be pleased to be involved in its drafting.

Access to justice issues – Jurisdiction, compensation and offences

1. **Feedback is sought on stakeholder experiences of the current arrangements for managing EPOA disputes through the existing court and tribunal systems in their State or Territory, and options which could be considered to enhance access to justice in cases of potential breaches of attorney duties.**

Comment

We wish to point out that redress is costly, time consuming and complicated in most jurisdictions and reforms are urgently required.

2. Feedback is sought on whether the proposed approach to compensation and offences is sufficient or requires further elements, to address particular trends for either principals or attorneys which you are aware of.

Comment

We agree with the proposed approach. However, we believe that such redress should be conducted by a tribunal unless the principal prefers to initiate Court proceedings.

Information, resources or training for witnesses and attorneys

1. **Feedback is sought on the resources, assistance and guidance which should be made available to assist witnesses, attorneys and principles to undertake their roles under financial EPOAs.**

Comment

Additional resources, assistance and guidance are essential and are needed for all parties involved in EPOAs – Principles, attorney's and their families.

Resources should be available in a range of mediums to increase accessibility. Further they must be set out in plain language and available in a variety of different languages in addition to English.

Resources can be in the form of guides, fact sheets and question and answer style materials. This can be available online, including downloadable content, interactive tools, and videos. Resources must be able to be readily accessible by everyone. The option to request print or electronic resources via a portable storage device (e.g. USB flash drive) should be available. This ensures those located in remote communities with poor internet connections or those who are not technology capable (such as older Australian's) can access these essential resources.

2. **Do you consider voluntary online training modules as being a suitable path to explore further, as a way to inform and support principals, attorneys and witnesses?**

Comment

Online training modules may be beneficial and of assistance to attorneys in understanding their role and obligations. Any form of education should be voluntary and while it can be recommended, it should not be mandated.

The value or usefulness of any courses would depend upon its content, method of delivery and engagements. Access to this material will be limited for those with no or limited internet access, such as those in remote communities. Consideration would been needed on alternative delivery channels and mediums, including the posting of resources, accessible in print or via USB flash drive.

3. **Feedback is sought on whether you are aware of particularly useful resources for witnesses, attorneys and principles, which you would recommend be considered as a resource across jurisdictions.**

Comment

We do not intend to comment on this question.

4. **Should there be any monitoring and/or reporting of training for witnesses, attorneys and principals?**

Comment

We would welcome the delivery of a wider range of resources to assist witnesses, attorneys and principles, including access to training. While there is a practical benefit in completing some form of training prior to the execution of an EPOA this should be voluntary and not mandated. There are a number of practical reasons that need to be considered.

Education should not be a barrier to the implementation of an EPOA. Circumstances can mean that time is of the essence. Further, the EPOA may not be acted upon until sometime into the future. Education would therefore be beneficial at the time the EPOA is to be used. An attorney – principal relationship can also be one that is in place and fully functioning over the course of many years.

Training and education resources should be freely available and accessible at any time when it is needed.

5. How can witnesses, attorney and principals be encouraged to undertake training, including any ongoing/refresher training?

Comment

Parties should be able to register for regular updates to the resource centre available in their jurisdiction.

Prompts or nudges should be included in document checklists and accompanying guidance documents to raise awareness prior to execution. Nudges can also be provided by groups such as banks, financial institutions and government agencies who are receiving powers of attorney, with the provision of an information brochure promoting the resources and materials available in the relevant jurisdictions. These could also be made available to a range of professional advisors including accountants and financial advisors who may provide advice or services for the principal and their attorneys.