

# National Register of Enduring Powers of Attorney – Public Consultation Paper

## Submission to the Attorney-General's Department

Submissions can be lodged by email and sent to [nationalregister@ag.gov.au](mailto:nationalregister@ag.gov.au) by **30 June 2021** and must include a name and contact details for the department to discuss the submission should there be a need to do so.

The questions below reflect the exact questions contained in the Consultation Paper, and are provided for ease of reference. The [Consultation Paper](#) is available on the Attorney-General's Department website for further context on each of the questions below. You are not required to provide a response to every question, the answer space may be left blank or marked with 'no comment'. There is no word limit for responses to any question.

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Would you like to be contacted with updates about this project?

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Yes  No

## A National Register of Enduring Powers of Attorney

**Question 1:** Would a National Register reduce financial abuse? How could this be achieved?

The register alone will play a small role in the reduction of financial abuse. However the SMSF Association sees this as an important first step and an opportunity for broader reform and improved protections. With the requirement for all new enduring powers of attorney ("EPOA") to be registered, it provides a mechanism for financial institutions and others to confirm that the EPOA is valid.

Another key component is the ability to record the withdrawal, termination or cancellation of an EPOA by the principal, making it more difficult for the attorney to continue to act using an invalid EPOA.

**Question 2:** Are there any risks associated with the National Register? If so, how could these be minimised?

**Question 3:** How can the registration scheme be designed to ensure accessibility and facilitate use by Aboriginal and Torres Strait Islander people, those from culturally and linguistically diverse communities, and those in rural and remote areas?

## Access arrangements consistent with the purpose of the National Register

**Question 4:** Do you support the proposed access arrangements in section 3.2.6? Are there any other users who need access?

The use of a unique registration number would be beneficial. As stated it would allow users to record the EPOA details, registration number and register confirmation. This would provide users with important auditable information to demonstrate that their internal and legal obligations have been complied with.

**Question 5:** Why might someone need to apply to access the register (if not in categories (a)-(d) at 3.2.6)? What should be considered a legitimate need?

Professionals such as accountants, lawyers, financial advisers or tax agents must be included on the approved list to access the National Register. These professionals may be engaged to provide services to or for the principal. Under the EPOA, the attorney engages that professional.

The services to be provided may involve a one off financial transaction or ongoing services. Due to the nature of the services to be provided by these professions, and the requirement for them to identify and know their client, the professional should be granted access to the Register to confirm the currency and validity of the EPOA document provided to them by the attorney.

A review of the register may be needed on an ongoing basis to verify its ongoing validity. Checks would be needed on or before their appointment, as part of their legal and professional obligations, ethical standards and processes required to confirm their ability to commence the engagement. Going forward, additional confirmations of the register may be required before the professional undertakes further transactions or provides additional services with respect to the Principal.

For anyone outside the prescribed listing, an authority form (in the prescribed form) could be used. This would be signed by the attorney, Public advocate or the principal (where legal capacity is present) to authorise the relevant party to search the register. The authority form can provide for consent to be given as to the level of information or detail that can be provided.

It is vital that the personal information of parties are protected so that details contained on the register can not be used for fraud, identity theft, breach of Family Court or restraining orders or the targeting of vulnerable people. That only parties who are authorised to do so, either at law or via an authority form can access prescribed information.

**Question 6:** What reasons should be sufficient for a person to be given access by application?

In the application, full details of the reasons and purpose for the application must be provided.

Suitable reasons would include proposed contracts, financial arrangements or agreements, a contract or agreement, application for investment arrangement (regulated and unregulated or private), providing credit and the value of the contract or arrangement.

**Question 7:** Where access is by application, what information should be provided to demonstrate a legitimate need? What is a reasonable time for processing this kind of request for access?

Full details of the relevant transaction or arrangement should be provided. Depending on the nature of the transaction, documents would include, signed copies of contracts, applications and agreements.

**Question 8:** Where access is by application, would any circumstance justify the need for urgent access? What are these?

None identified

**Question 9:** If applicants are denied access, should they be entitled to request a review of this decision? If so, what would the review process look like?

**Question 10:** Are there any circumstances in which access should be given without an attorney or principal's consent? What are these? How should this work in practice?

**Question 11:** Should users be required to inspect an imaged copy of the executed instrument to satisfy themselves of the terms of the EPOA?

Prescribed parties at law, should be able to view the imaged copy of the executed instrument to allow them the opportunity to compare to the document provided to them. Similar rights should be afforded to a party that makes an application supported by a written authority from the principal or their attorney.

**Question 12:** In what ways should the register enable information collected online to be interrogated by persons who search the register?

Where a request is lodged, details of the EPOA should be included on the form. Where the details do not match those on the register, the user should be advised accordingly.

Information to be verified should include, registration number, principal and attorney names, date of birth, EPOA State or Territory, date of the EOPA, date added to the register, expiration date (where one is included in the EPOA terms).

Any any special powers granted or terms under the EPOA should be disclosed. For example, an EPOA put in place specifically for a person to act as a trustee (or director where a corporate trustee) on behalf a member of a self managed super fund.

## Making phase

**Question 13:** Are there any issues in allowing online creation of EPOAs? If so, how could those issues be addressed?

Whilst a helpful tool, it will be essential that appropriate warnings and the need for legal advice are included. Jurisdictional issues will need to be highlighted and where special purpose clauses may be required, such as when including powers for trustees of self managed superannuation funds.

**Question 14:** How should the register ensure that the information entered online in creating an instrument is identical to the signed and witnessed document?

When an application is made to lodge the EPOA, the information to be included on the register shall be included in the application form. The register will review the form and the EPOA to ensure that the details match. An image of the signed EPOA must also be provided.

The input and uploaded information should be verified to ensure that it agrees before publishing.

## Lodgement phase

**Question 15:** Who should be able to lodge an EPOA for registration?

The principal, attorney or legal practitioner who prepared the EPOA.

**Question 16:** What information should be checked on an EPOA when it is lodged? How should this information be checked?

The process of identifying both the principal and the attorney should verify the full names, date of birth and address of the respective individual are the same.

**Question 17:** How should people be able to lodge EPOAs for registration – online, by post, in person?

The ability to lodge EPOAs for registration via a secure online portal should be considered. This would be beneficial for lawyers assisting their clients. Online services can also incorporate any necessary identification processes, similar to that available through MyGovId.

As an alternative, an over the counter option should be provided through a Government agency such as Australia Post. This agency already provides essential services such as passport and tax file number applications, identification checks for land title office transactions and property transfers.

The latter includes an identification process, identification is scanned and recorded, a declaration form is signed and witness, and the applicants are photographed by the Australia Post staff member. This process has been successful in preventing frauds involving the illegal sale or transfer of real property with the land titles office.

**Question 18:** Are there any additional options that should be available for people living in remote communities?

**Question 19:** Are there any risks in allowing people to lodge EPOAs online? What safeguards could be implemented to protect against these risks?

The parties who can lodge online should be limited to lawyers, public trustees and advocates only.

All other parties should be required to lodge via a Government agency, such as Australia Post, which has established systems and processes for the receipt and processing of forms and document, that also require stringent photo identification processes.

## Registration phase

**Question 20:** What documents should be included on the National Register?

An image of the executed EPOA, the application to register, copies of any notices withdrawing, terminating or cancelling the EPOA.

**Question 21:** When should EPOAs be required to be registered (when they are made or before first use)?

Registration should occur within a prescribed time of the EPOA first being made. The EPOA should not be used or relied upon until it is registered.

**Question 22:** What information should be checked on an EPOA when it is registered? How should this information be checked?

The principal and the attorneys details stated in the EPOA should be verified to the photo identification provided as part of the registration application process. Details such as their full names, dates of birth and addresses should agree over both documents.

**Question 23:** What information should that person have to give to a registering authority to confirm their identity?

Their full name, date of birth and address, supported by photographic identification.

**Question 24:** Should registration of revocations by the principal be mandated? If so:

- a. What would be the effect of failing to register a revocation?
- b. Who should be able to lodge revocations for registration?
- c. Should the register record other revocation events (for example, the death of the principal, bankruptcy of attorney) and, if so, how?

Yes, registration of revocations should be mandatory. This will be an important feature of ensuring the integrity of the National Register. Further, failing to revoke an EPOA may put the principal at risk of financial harm.

Revocations should be able to be lodged by the principal, the attorney, or the replacement attorney or administrator, the legal practitioner who prepared the documents, the public trustee or adocate.

The recording of the death of the principal will be essential given that the EPOA ceases upon the their death. Users may not be aware of the principal's passing. This can reduce the incidence or fraudulent transactions occuring after the death of the principal by the attorney.

**Question 25:** To what extent should the register reflect the status of an EPOA?

The date of the EPOA, the date it was registered, if the EPOA has been verified and approved by the state authority (where applicable) or other, the date it was revoked, cancelled or terminated.

Historical EPOAs in place prior to the commencement of the National Register should be clearly flagged to highlight to users. Where applicable they should also be directed to the relevant State or Territory register.

## Historical EPOAs (i.e. EPOAs in existence prior to mandated national registration) – Registration phase

**Question 26:** What arrangements would need to be made for historical EPOAs to be registered?

The age of an EPOA does not necessarily expire over time unless a specified end term is included. The challenge here will be where the EPOA has no prescribed end date, it is truly enduring and the principal has since lost capacity and unable to execute a new EPOA.

Consideration will also be needed for those who may have more than one EPOA, permitting multiple registrations where appropriate. One EPOA may be in place for an individual's ordinary financial affairs and a second that has specific powers relating to the management of a self-managed superannuation fund in which the principal is a member.

Where there has been a loss of capacity of the principal, it may be difficult to verify the validity or status of a historical EPOA.

The attorney should be able to register these historical EPOAs. A statutory declaration should be incorporated as part of the registration process, requiring the registrant to declare that the EPOA held is still valid and was not revoked, the principal is unable to make a new EPOA, that the attorney continues to act in that capacity on behalf of the principal. It is an offence to make a false declaration.

However these historical EPOAs should be flagged accordingly on the register to alert users.

A party should also be able to challenge a historical EPOA. Particularly where a more recent EPOA was executed. An objection or complaints process should be made available to consider such matters.

**Question 27:** What arrangements would need to be made to require historical EPOAs already registered on state or territory registers to be registered on the National Register? Should a fee be payable for historical EPOAs to be registered? Should this be any different where the EPOA is already registered on a state or territory register?

Where a historical EPOA has already been registered in state or territory register, either no fee or a nominal fee only should apply. These parties should not be penalised for complying with the requirements in their jurisdiction, to then comply with a new National scheme. Further, they should be actively encouraged to participate and register the EPOA.

For all other historical EPOAs, a transition period, of say 12 months, should apply where the EPOA can be registered for a nil or nominal fee. After that time, normal registration fees should apply.

**Question 28:** For solicitors holding historical EPOAs in safe custody – how could the principal/attorney be contacted to arrange registration?

## Unregistered EPOAs – Registration phase

**Question 29:** What should be the effect of reliance on an unregistered EPOA? Should this be any different for historical EPOAs?

A party who relies on an unregistered EPOA carries the risk of financial loss where the EPOA is deemed to be invalid. A failure to confirm its registration status would be poor due diligence.

The ability to search a National Register to verify the status of an EPOA would be welcomed by accountants, tax agents and financial advisers. As it provides important assurances. The searching of the register would form part of any professional practice or service provider and ethical business practices.

**Question 30:** What process should there be for considering whether an EPOA can be registered after first use or out of time? Who should be empowered to make decisions about this? The registering authority? Courts or tribunals?

Where an application is made to register an EPOA, and the required registration period has already passed, consideration should be given to period of time that has since passed. A reasonable reason should be given as to why the application has been made late. There may be compassionate reasons as to why which should be carefully considered.

Where a protracted period of time has passed, the application should be reviewed by a tribunal or panel to determine if the EPOA can be registered. If it is unable to make such a determination, the matter should be referred to the relevant Court for the jurisdiction in which the EPOA is made.

## Notifications – Registration phase

**Question 31:** Should the register provide a notification function to parties of an EPOA? How should this work? For example, should certain identified persons be notified when a search query for an EPOA occurs?

Yes. In order to ensure the integrity of the system, parties should be advised that a search query has been made. Particularly if that search is not one that has been authorised by either the principal or the attorney such as where an application has been made by another interested party.



## Options to address dual registration

**Question 32:** What principles should be taken into account in considering options for dealing with dual registers?

Once the National register is operational, this should replace any State or Territory based registers for all new registrations. The State or Territory registers would remain in place, continuing to provide important services with regards to historical EPOAs already registered.

Users of the National register should be alerted where a Historical EPOA is also registered on the respective State or Territory based register.

**Question 33:** Are there any issues specific to dealing with lands related EPOAs?

Presently some land titles offices will not allow an EPOA to be used even though it satisfies all other legal requirements, because it is not in the form they require and and it is not a newly made EPOA.

This can cause stress and concerns for families where a loved one has lost capacity and a property now needs to be sold, such as to provide for aged care bonds.

Often those who prepare an EPOA themselves are unaware of the requirement to also prepare and lodge the EPOA with the respective land titles office and that the EPOA must be made on the prescribed form.

**Question 34:** Is there any feedback on the options described, or alternative options that could be considered?

The National Register should become the only active register. If multiple systems continue in parallel, with State and Territory based registers (where applicable) along with the need to also register an EPOA with the respective land titles office creates duplication, confusion and likely additional costs for no additional benefit.

**Question 35:** Do you have any information on the proportion of EPOAs that your agency or clients make that are registered on the land titles register (if applicable)?

No

**Question 36:** Are separate EPOAs prepared specifically for land transactions?

This can sometimes be the case. In order to meet the specific form, process and time requirements to register with the respective land titles office.

**Question 37:** Do you have any information on the average length of time between the making of an EPOA and the registration of an EPOA on the land titles register?

No

**Question 38:** Do principals have any concern about registering the EPOAs on the land titles register due to privacy concerns (i.e. that the instrument would then become publicly searchable)?

**Question 39:** Would principals or attorneys object to paying two registration fees?

The expectation would be for a simple, centralised system with one fee to apply. Multiple registration points in crease complexity, red tape and cost.

## Safeguards

**Question 40:** What safeguards should be included in the National Register for older persons who may not be digitally capable?

**Question 41:** What safeguards should be included in the National Register to help protect individuals where there is family violence?

A principal or an attorney should have the ability to apply to block access for prescribed individuals to the Register where restraining orders are in place. Other measures such as allowing only legislated users, those holding a written authority from the principal or the attorney or those who have applied and demonstrated that the purpose is legitimate and appropriate.

The private addresses of the respective individuals should be redacted from any information provided, including any images of the EPOA document provided to users.

**Question 42:** What safeguards should be included in the National Register to help protect individuals where there is elder abuse?

Individuals and business should be able to report concerns to the National Register where they see something unusual or behaviour that raises concerns. The complaint should be reviewed in a timely manner and if necessary, a warning indicator or flagging of the record should be included to alert future users of possible concerns. If on review the matter is considered serious enough, the registration details should be withheld and the matter referred to the relevant authorities.

**Question 43:** Should a support person be able to lodge an EPOA on behalf of the principal? If yes, who should be able to act as this support person?

The Public Trustee, a public advocate or lawyer acting for the individual should be able to lodge an EPOA on behalf of a principal.

**Question 44:** If the registration process is too complex, a potential principal may use alternative forms of financial management with less safeguards. How could this be avoided?

It will be essential that registration is relatively simple and readily accessible. By granting lawyers and public advocates online access to register and for other parties, using a Government service such as Australia Post, provides ready access for a large proportion of the population.

The use of public information campaigns on the Register, how it works and how to register and EPOA will be necessary. Consideration should also be given to providing some simple, general information on EPOAs and direct people to their respective State and Territory based authorities for further information.

## Additional comments welcome

The department welcomes general comments or feedback relating to this National Register of Enduring Powers of Attorney public consultation.