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.

CHARTERED ACCOUNTANTS AUSTRALIA + NEW ZEALAND

CPA AUSTRALIA

IPA INSTITUTE OF PUBLIC ACCOUNTANTS

SMSF ASSOCIATION

Yours faithfully,

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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)?**

    - **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.