



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

30 June 2021

Attorney-General's Department
Attn: Elder Abuse Team, Family Safety Branch
Re: Consultation RIS
3-5 National Circuit
CANBERRA ACT 2600

Email: nationalregister@ag.gov.au

Dear Sir / Madam

National Register of Enduring Powers of Attorney – Public Consultation Paper

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide feedback to the Attorney-General's Department on its Enduring Powers of Attorney (EPOA) National Register – Policy Design Consultation Paper.

As stated in our 2020 submission to the Department, the FPA supports the establishment of an EPOA National Register.

We would welcome the opportunity to discuss with the Review any matters raised in our supplementary submission. If you have any questions, please contact me on 02 9220 4500.
Yours sincerely

Ben Marshan CFP® LRS®

Head of Policy and Professional Standards
Financial Planning Association of Australia

¹ The Financial Planning Association (FPA) has more than 12,919 members and affiliates of whom 10,618 are practising financial planners and 5,540 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally.
- We are recognised as a professional body by the Tax Practitioners Board.



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NATIONAL REGISTER OF ENDURING POWERS OF ATTORNEY

Prepared for Attorney-General's Department

30 June 2021



Introduction

The FPA agrees that without government action the issues associated with a lack of transparency of EPOAs are unlikely to be sufficiently addressed. Mandated registration of an EPOA will increase the transparency and safety of the system and reduce the risk of fraud. It is a necessary and positive step to improve protections for the principal and the attorney. However, the design of the National Register must facilitate the needs of the principal in an efficient manner and should not impede the care of the individual.

The FPA suggests consideration be given to including approved court and tribunal orders for the appointment of guardians and financial administrators on the National Register.

Attorney education

The FPA supports the inclusion of education information for attorneys in the National Register design.

Feedback from FPA members suggests that attorneys do not always understand their legal responsibilities. Of particular concern is the common misunderstanding of attorneys making financial decisions based on what they believe the principal would want (such as gifting to the grandchildren to improve eligibility of the aged pension) – “what mum would have wanted” is not the same as what is in the principal’s best interest as required by law.

Making, lodgement and registration phases

The FPA supports in principle the proposed making, lodgement and registration phases for the National Register. However, FPA members are concerned about the potential for the principal to make an EPOA without proper legal advice.

It is vital that the National Register system includes safeguards to ensure the principal has capacity to understand the legal implication of establishing the EPOA, how the EPOA will operate and the delegation of authority over their financial affairs under the EPOA.

There are specific parameters for who may assess capacity including medical and legal professionals. Legal practitioners specialise in establishing EPOAs and have the skills to make a professional judgement about the principal’s capacity to understand what they are signing, as well as signs of potential coercion and/or financial abuse.

The introduction, making, lodgement and registration phases of the National Register should include clear and simple information about the benefits of engaging a legal practitioner to assist the principal to put in place the appropriate EPOA.

The lodgement/registration phase should require the verification of the EPOA to be checked and signed by a legal practitioner or a particular type of individual, such as those authorised on the Commonwealth list of approved witnesses for statutory declarations.

Registration of historic EPOAs

The FPA supports in principle the registration of historic EPOA documents. However, mandating the registration of EPOAs as a retrospective measure may place some principals at risk, and create an unnecessary cost burden for principals.

As acknowledged in the consultation paper, Tasmania is the only jurisdiction that currently requires the registration of EPOAs. In all other states and territories it is unknown how many EPOAs exist, who



the principals and attorneys are, and whether the EPOAs are active or not. Some EPOAs may have been put in place by a principal some years ago.

The number of EPOAs involving trustee companies may provide useful data for considering this issue and the cost benefit analysis of mandating registration of historic EPOAs.

Our concern is that a principal may believe they are secure and prepared with the historic EPOA they have put in place and not become aware of the need to register an historic EPOA for it to be valid.

The purpose of an EPOA is an important consideration in this issue - an EPOA is a legal document that allows the principal to appoint someone they trust to make decisions for them during their lifetime, if they no longer have the capacity to do so. The enduring power is only given to the attorney when the EPOA becomes active, which is usually when the principal loses capacity to manage their financial affairs or at a date or specific point in time as determined in the EPOA (for example the individual relocates overseas as an expat with financial affairs still in Australia). Given it is unclear how many historic EPOAs exist, it is not possible to determine the percentage of EPOAs that become active versus the percentage of EPOAs that are never used (eg. the principal did not lose capacity, or the EPOA 'activated', prior to the principal passing away).

An alternative proposal could be requiring the registration of historic EPOAs following a transition period and only once the EPOA is activated. For example:

- All EPOAs made on or after 1 January 2022 must be register on the National Register for EPOAs to be valid, and
- all EPOAs made before 1 January 2022 must be registered if they become active on or after 1 January 2022, and
- if an EPOA becomes active prior to 1 January 2022, the EPOA must be registered,
- however, any inactive EPOA made prior to 1 January 2022 may also be registered prior to being activated. An unregistered inactive EPOA made prior to 1 January 2022 will still be valid as long as it is registered once activated.

The intent is to ensure all active EPOAs are registered on the National Register while minimising the costs for registering historic EPOAs that may never be used.

Consideration should also be given as to how to effectively notify individuals to ensure active EPOAs are registered. There is a high risk that some individuals may not be notified or become aware of the need to register an historic EPOA, should this be mandated, putting the EPOA at risk of becoming invalid at the time the principal needs to rely on it.

[Status, notifications and activating an EPOA](#)

The FPA supports a search of the National Register revealing the existence and status of an EPOA. The status could include tags such as registered, active/inactive, attorney/guardian/trustee appointed, revoked, superseded, and loss of capacity. It should also highlight the state in which the EPOA was registered so it is clear which jurisdictional laws are applicable.

The requirement for capacity to be determined by a medical professional provides an opportunity for additional safeguards to be built into the National Register by requiring a medical notification to be lodged for the EPOA that the principal has lost capacity.



The FPA suggests the National Register highlight that an EPOA has become 'active' on the Register once a medical notification has been lodged that the principal has lost capacity.

The National Register should have provision for differentiating when a person has lost capacity.

Minimising financial abuse

The FPA has received member feedback highlighting concerns about how to ensure principals who have loss of capacity do not make adverse financial decisions and transactions outside of an active EPOA.

The FPA has been provided with the following summarised case study examples of this issue:

- financial management orders have been put in place and 'activated' by the court or tribunal (where a person clearly has no capacity and a substitute decision-maker is appointed) – but the "protected person" might go to a bank and take out a loan with no questions asked.
- an individual with a brain injury who has a trustee company in place as their financial manager, yet independent of the EPOA manage to secure a loan from a bank and buy property. The financial manager may not find out about such transactions for an extended period of time, if ever.

This puts the principal at significant risk of coercion, financial abuse and detriment.

The establishment of the National Register provides a tool to enable financial institutions and relevant entities to minimise this risk.

The FPA recommends the National Register includes permissions to search the register for the existence of an EPOA when a financial institution, relevant entity (such as a real estate agent), or professional services provider suspects a customer may have loss of capacity, or be experiencing financial coercion or abuse. This would enable the provider to check if an EPOA was in place, and follow appropriate procedures to protect the principal. This may include notifying the appointed financial manager or attorney.

The FPA acknowledges this recommendation is reliant on financial institutions, relevant entities, and professional services providers having appropriate process and staff training in place to identify such risks and minimise financial abuse.

3.2.6 Access arrangements consistent with the purpose of the National Register

Financial planner access to search the register

When considering the estate planning needs of a client, financial planners commonly recommend the clients see a solicitor or legal professional to ensure appropriate Wills, Powers of Attorney, and Guardianships (and other arrangements) that meet their client's needs and preferences are in place.

Financial planners also assist clients when an EPOA is activated, which could be for different reasons such as loss of capacity or where a client relocates overseas under an 'expat' arrangement.

Financial planners commonly have ongoing arrangements in place to manage their client's investments and financial affairs, and are often contacted by and need to work with attorneys acting under an EPOA. Financial planners may also be appointed as the attorney under an EPOA.



Financial planners have a legal obligation under the Corporations Act to ensure their advice and professional services are in the best interest of the client and appropriate for the client's circumstances, including when providing financial advice services to an attorney under an EPOA, and when acting as the attorney. Planners assist principals and attorneys operating under an EPOA with the following matters:

- Reviewing the principal's financial plan being implemented under an EPOA to ensure it remains appropriate and in the principal's best interest based on the principal's changing circumstances and needs.
- Cash flow matters to ensure bills can be paid to support the needs of the principal
- Debt management
- Access to social security benefits
- Aged care funding arrangements
- Organising documentation and executing instructions in relation to a Self Managed Superannuation Fund (SMSF) – it is usually recommended that SMSF Trustees have an EPOA arrangement in place in case a fund member loses capacity or is no longer able to fulfil trustee duties. This allows the fund to continue to operate in order to protect the principal's and members' superannuation assets.
- Executing the administrative requirements for the management of financial products such as superannuation, under an EPOA
- Execute instructions to switch or redeem superannuation under an EPOA
- Managing investment portfolios
- Managing an insurance claim

Financial planners have a clear and demonstrated business need for 'ongoing real time access' to the register to search and view the full details of the relevant EPOA registrations in order to assist clients – principals and attorneys – in line with the purpose of the National Register (3.1). This will allow the financial planner to verify the validity of an EPOA, who the current attorney(s) are, the requirements of the EPOA, and how it is to operate, which will reduce the cost of advice for principals and allow planners to act more quickly in executing EPOA instructions/transactions in the principal's best interest.

The ongoing relationship most clients have with their financial planner also allows planners to get to know their clients and identify signs of potential financial abuse.

Based on the access arrangements proposed under 3.2.6 of the consultation paper, it is currently unclear as to whether financial planners would be permitted 'ongoing real time access' to the register.

- Financial planners are not 'financial institutions' needing access in relation to 'relevant financial transactions' (3.2.6(c))



- One-off access to the register would not permit planners to ensure the ongoing validity of the EPOA and protect the interests of the principals (3.2.6(d))
- Requiring financial planners to apply for access to the register would create unnecessary delays and put the principal's financial affairs at risk (3.2.6(e)).

The efficient and timely management of a principal's financial portfolio is critical for ensuring financial plans are implemented in the best interest of the principal and financial affairs are in order to meet the needs of the principal.

Financial planners are heavily regulated and must meet legislated education and professional standards, as well as ongoing legal obligations under the Corporations Act, to be authorised and registered on the ASIC Financial Advice Register (FAR) in order to provide financial advice to clients.

The FPA recommends financial planners are specifically permitted 'ongoing real time access' to the register to search and view the full details of the relevant EPOA registrations in order to assist clients. This could be achieved by introducing a new category in 3.2.6 of Financial planners and financial advisers listed on the ASIC Financial Advice Register (FAR).

Corporate trustee/attorney

A principal may appoint a business as a corporate trustee/attorney. Under such arrangements, it is common for the corporate trustee/attorney to delegate this authority to an appropriate authorised representative, such as a financial planner, to act as the individual attorney for the principal.

The current processes used by financial institutions are designed to verify the identity of an individual attorney, not an authorised delegate of a corporate trustee/attorney. FPA member feedback indicates significant delays of up to 3 weeks for financial institutions to verify the identity of corporate trustees/attorney's authorised delegate. This can occur on each occasion that the corporate trustee/attorney must make a transaction for the principal. This is a significant delay that places the needs of the principal at risk.

The FPA recommends the National Register include a specified field for a corporate trustee/attorney, and for the authorised delegate to be included.

National Register access code

It has been suggested in the consultation paper that permission to search the Register could be granted by the principal and/or attorney sharing a unique registration number with the relevant person/institution.

The FPA appreciates the challenges associated with designing a process that permits specified relevant individuals and entities to search the Register with appropriate safeguards to protect the principal. FPA members have raised the following considerations:

- How does the attorney identify those entities/individuals who have a legitimate business need to search the register to ensure the principal's financial affairs are managed under an EPOA in the best interest of the principal?
- Could a specific prompting question be included in the making phase of the EPOA about who should have access to search the Register, including information on the entities and individuals (professionals) who may require access in order to implement the principal's preferences under an EPOA?



- How long is the EPOA unique registration number valid for?
- Can access to the Register using the EPOA unique registration number be switched off?
- Will the validity of the EPOA unique registration number and who has permission to use it be reviewable?

The EPOA should identify relevant parties who require access to the Register to ensure the principals preferences and needs can be met.

Safeguards should be included to minimise the risk of financial abuse. There is a concern that the attorney could block access to the Register by refusing to provide the unique registration number to professional services providers, or switching off the registration number. Attorneys are required to act in the best interest of the principal. This must include the provision of the unique registration number to the relevant parties.

However, some EPOAs, particularly historic EPOAs, may not identify the specific relevant parties who require access to the Register to ensure the principals preferences and needs can be met. There may also be instances where, once the EPOA is activated, the attorney determines they are not equipped to manage the financial affairs of the principal without professional assistance. The regulation of the Register should allow the attorney to seek profession assistance to manage the financial affairs in order to meet the needs of the principal. The principal and/or attorney should be permitted to share the unique registration number with the relevant person/institution to provide access to the Register.

Consideration should be given to the potential for other individuals blocking access to the register, such as relatives, and the ability to 'flag' people of concern who may put the principal's preferences as detailed in the EPOA at risk

Practical issues of verifying EPOAs on the National Register

The FPA supports 'ongoing real time access to the register to enable financial institutions to verify an EPOA for relevant financial transactions, with permission from the principal and/or attorney', as proposed in the consultation paper. However, we have questions regarding how this will work in an efficient manner in practice to achieve the intended consumer protections.

For example, it is common for attorneys to be responsible for ensuring rent, aged care, and other bills are paid using the principal's accounts. Currently this usually occurs by the attorney presenting the authorising EPOA in person to the bank teller who, once sighting the EPOA and verifying the identity of the attorney, can process the transaction immediately.

The expediency of the EPOA verification system is vital to ensure financial transactions can be made in a timely manner to ensure the principal is not penalised for late payments, for example. Moving to an online system risks the efficiency of the processes for checking the validity of an EPOA and verifying the identity of the attorney. This raises the following questions:

- What parameters will be placed on financial institutions and relevant professionals for searching the EPOA National Register?
- Will this access be restricted to a limited number of appropriate representatives of the financial institution, or will all frontline staff be permitted to search the Register using the unique registration number provided by the attorney?
- Will the search of the Register by a financial institution representative require oversight of a supervisor?



- Will certified hard copies of the EPOA still be permitted to be used to verify the identity of the attorney and validate the EPOA?
- What back up processes will be available for checking the validity of an EPOA and verifying the identity of the attorney should the National Register fail due to a system outage or cyber-attack?

The verification process is critical for the protection of the principal but it should not impede the care of the individual.

The FPA suggests consideration be given to the appropriate access arrangements and processes for financial institutions.

Access report

The National Register should have the ability to allow reports to be drawn of a list of individuals and authorised delegates who have conducted searches and accessed information pertaining to a particular EPOA.

Efficient attorney identity verification processes

As each individual with an EPOA has unique financial arrangements, a range of professional services providers and financial institutions are often approached by attorneys acting under an EPOA. Under the current system, each organisation responds to requests by attorneys operating under an EPOA based on their own internal policy, including the verification of attorney identification. This has created inconsistency and led to re-verification being conducted each time the attorney acts under the EPOA.

To facilitate the needs of the principal, it is vital that the identity of the attorney can be verified by financial institutions, relevant entities, and professional service providers in a timely manner.

The FPA recommends:

- a standard set of identification requirements be mandated for checking that the attorney is who they say they are,
- the National Register permit the recording of the attorney's identity documents as seen and approved by the appropriate entity/provider,
- financial institutions and professional service providers be permitted to rely on the approved attorney identity documents recorded on the Register for the purposes of verifying the identity of the attorney.

Land Titles Office

The FPA supports in principal the linking of the land title offices' registers with the National Register for EPOAs.

The home is usually the principal's largest financial asset. Therefore, linking the registers will help minimise the risk of the home being sold against the principal's EPOA and best interests.

However, the Land Titles Office is a public register. The privacy of all parties to the EPOA must be protected. The ability to access and search the EPOA National Register must be restricted to financial institutions, lawyers and solicitors (undertaking conveyancing for property transactions), and relevant



providers. The general public should not be able to access the National Register via a Land Titles public register.

Linking the Land Titles registers and the National Register for EPOAs would potentially remove the need for separate EPOAs specifically for land transactions, such as the leasing of a property or granting an easement, for example. All financial matters, including land transactions could be included in the one EPOA registered on the National Register. This would significantly improve efficiencies, minimise costs caused by regulatory duplication, and improve consumer protections by enhancing the detection of potential financial abuse and coercion.

The National Register could include a tag for EPOAs that include land transactions. A principal may want to ensure that certain people are unaware that he or she has an EPOA and an appointed attorney to act on his or her behalf. Therefore, Land Title registers should not 'flag' that an EPOA exists in relation to a particular property.

Family violence

The Department of Health and Welfare² states that both family violence and domestic violence include behaviours such as:

- physical violence (hitting, choking, use of weapons)
- emotional abuse, also known as psychological abuse (intimidating, humiliating)
- coercive control (controlling access to finances, monitoring movements, isolating from friends and family).

According to the Australian Bureau of Statistics (ABS) Personal Safety Survey 2016, an estimated 1 in 6 (17%, or 1.6 million) women and 1 in 16 (6.1%, or 0.5 million) men had experienced violence from a current or previous cohabiting partner since the age of 15 (ABS 2017).

Financial abuse may be linked to family and domestic violence and include coercion in relation to EPOAs.

The FPA suggests consideration be given to including consumer protections on the National Register by 'flagging' EPOAs where an allegation of family or domestic violence has been made or an order is in place. This would notify financial institutions and professional services providers of the increased risk of coercion and abuse.

Accessibility for cultural diversity

There are different kinship arrangements of Aboriginal and Torres Strait Islander people in different communities and with different names. Kinship arrangements of indigenous people are tracked using traditional name changes particular to the community.

The individual's name as registered with Births, Deaths and Marriages, may also differ to the name the individual uses and knows. This can cause confusion for financial institutions.

Naming considerations of other cultural groups include Indonesian people who may only have one name.

The FPA recommends the National Register caters for the diversity of naming practices of the diverse range of people and cultures in our community.

² <https://www.aihw.gov.au/reports/australias-health/health-impacts-family-domestic-and-sexual-violence>



Costs

The cost to complete the process of registering an EPOA must be reasonable so as not to deter individuals from putting an EPOA in place.

The FPA notes the charge for lodgement of a Power of Attorney on the Tasmanian Register is to increase to \$149.32 as at 1 July 2021. The FPA suggests this is a reasonable fee.

However, the FPA opposes a fee applied to the query phase of the National Register. Once an EPOA is registered, the register operates as a repository of information with the ability to search the register heavily restricted to those involved in facilitating the needs of the principal. A search of the Register does not change the information on the register and therefore does not require the uploading of information. Therefore, there should be no cost incurred by the Register operator to allow restricted individuals to conduct a search.

Any fees incurred for searching the Register will be passed onto the principal. This would create an accumulative financial burden for the principal, which would discourage people from putting in place an EPOA.

For example, if an attorney has to go into a bank in order to pay the principal's monthly bills, and the bank has to verify the validity of the EPOA and the attorney each time, this would result in a fee being passed onto the principal each month. Application to search an index, Power of Attorney or other instrument on the Tasmanian Register costs \$33.00 (from 1 July 2021) per search. Using the above example, this could result in an extra \$396 cost per year incurred by the principal.

Managing the financial affairs in order to meet the needs of the principal could involve multiple transactions with multiple financial institutions and entities each month. This would result in a significant financial burden for the principal.

The FPA recommends fees should only apply to the making, lodgement, and registration phase of the National Register, and to revoke an EPOA. There should be no fee to search the Register where no data change is occurring.