



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

9 March 2020

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

Email: EPOAConsultationRIS@ag.gov.au

Dear Sir / Madam

Enhancing protections relating to the use of Enduring Power of Attorney instruments - Consultation Regulation Impact Statement

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide feedback to the Attorney-General's Department on its Consultation RIS on enhancing consumer protections for the use of Enduring Powers of Attorney (EPOA) instruments.

The FPA's financial planner practitioner members have a wealth of experience in ensuring clients consider succession and capacity and have appropriate arrangements in place to support future needs well before a crisis occurs or dependency looms; and in helping attorneys' to execute instructions under an EPOA in the best interest of their client.

This submission is based on the experience and role of financial planners in helping clients (principals) in this regard.

FPA preferred option

The FPA agrees that without government action the issues associated with a lack of transparency of EPOAs are unlikely to be sufficiently addressed. While there is limited data on the extent to which EPOAs are misused by attorneys for financial gain, the FPA believes this is an ongoing issue that has likely been occurring since the establishment of the EPOA system, and that has not been resolved through non-government action to date.

Attempts to address this issue by private entities has been commendable. However, as each individual with an EPOA has unique financial arrangements, a range of professionals and 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

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.



policy. This has resulted in a lack of consistency in addressing this issue and left many loopholes in consumer protection, placing principals at risk of financial abuse.

The FPA supports government action to address the potential for financial abuse through the deliberate or unintentional misuse of EPOAs by implementing the following options as proposed in the Consultation RIS:

- Option 2 – National register with mandatory registration, and
- Act now and review in the future – “using a risk management approach, take sensible steps to reduce identified, but unquantified risks, and review the operation of the proposed solution after a pre-determined period of time has elapsed”.

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.

Registration costs

Financial planners have experienced difficulties in tracking documents such as EPOAs and Wills, when their client has moved states, or is based in a different state to the attorney. While a national register may assist in overcoming such obstacles, we are concerned about the administration and funding of the register, and the potential increased costs to Australians wanting to make pre-emptive arrangements to protect themselves in the future.

The FPA is concerned about the costs to consumers of mandating registration of EPOAs as they are private arrangements between individuals. The FPA notes the Consultation RIS indicates a potential fee range of between \$100 - \$200 per EPOA could cover the estimated register build and operating costs based on the three data scenarios detailed in the RIS.

As the RIS indicates that this will be a consumer pays register, the FPA:

- seeks clarity as to whether this fee range includes the compliance check of the EPOA, and
- notes the additional fee to be paid for authorised parties with a demonstrated business need to access to the register. This fee will most likely be passed on to either the principal or attorney.

Simplified registration system

The Consultation RIS suggests one option for the register could involve an online form for the creation for the EPOA, so the time associated with lodging the EPOA for registration becomes a component of the overall time taken to develop the EPOA.

The FPA supports this approach and suggests embedding the state/territory legislation compliance assessment of the EPOA application into the automated registration process. This could be achieved in a similar manner to the current two-step process for Australian passport applications:

1. the applicant completes an online application form



2. once approved, the applicant is provided with a letter confirming the application is compliant and accepted
3. the approval letter requires authorisation by a solicitor or legal practitioner
4. the authorised approval letter is submitted by the applicant with the necessary photo identification and payment at the post office.

While this approach would require the principal to undertake a two-step process, it puts in place safeguards to protect against coercion and duress of the principal, and the lodgement of fraudulent EPOA applications, and is based on a proven government system.

The FPA strongly supports establishing an automated system as the “point of lodgement for EPOA documents for registration and compliance assessment”.

Authorised third parties

As stated in the Consultation RIS, EPOAs are “private decisions made between members of the community”. While the FPA supports the establishment of a national register, care must be given to protect the privacy of the parties to an EPOA, particularly in relation to authorised third party access to the national database.

The Consultation RIS does not articulate a preferred approach to authorised third party access. The FPA suggests:

- the principal nominates third parties to access the individual records of the principal. This could be done at the time of registration of the EPOA, and / or
- establishing a legislated list of occupations or employers / entities (similar to the statutory declaration list of approved witnesses), based on a demonstrated business need for access to the register.

Financial planners registered on the ASIC Financial Adviser Register would require authorised third access to the national EPOA register to assist their clients and meet their legal obligations under the Corporations Act 2001.

Financial planners are required under the Corporations Act to consider their clients circumstances and provide advice that is appropriate for and in the best interests of their client based on their client's circumstances. The new statutory Financial Planner and Financial Adviser Code of Ethics also requires financial planners to consider the broader, long-term interests and likely future circumstances of their client, such as aged care needs. One of the primary ‘financial planning needs’ of a client is estate planning.

In order to provide appropriate advice particularly in relation to estate planning matters and aged care needs, a financial planner must consider their client's circumstances including any existing arrangements their client may have. Financial planners assist clients with all financial affairs including estate planning matters such as ensuring appropriate Wills, Powers of Attorney, and Guardianship (and other arrangements) that meet their client's needs and preferences are in place.



Option 2 would provide financial planners a quick way to verify the validity of an EPOA, who the current attorney(s) are and how it is to operate, which will reduce the cost of advice for clients and also allow planners to act more quickly in executing instructions/transactions, if required. Giving authorised third party access to financial planners would permit them to help SMSF clients where a member has lost mental capacity and an EPOA needs to be relied upon in getting documentation organised and instructions executed in relation to the SMSF for the principal as set out in the EPOA.

Financial planners commonly have ongoing arrangements in place to manage their client's investments, and are often contacted by and need to work with attorneys acting under an EPOA. The ongoing relationship most clients have with their financial planner allows planners to get to know their clients and identify signs of potential elder abuse.

Financial planners have a clear and demonstrated business need for access to the register.

The FPA recommends financial planners be authorised to search the proposed national online register of EPOAs so they can ascertain and understand existing arrangements a client may have in place, and meet their obligations under the Corporations Act.

The FPA also recommends product providers be granted authorised third party access to allow them to access the same EPOA documents to reduce duplication and turnaround times in processing client requests under an EPOA.

Privacy

The FPA recognises the role of data in formulating sound and effective policy, particularly in enhancing consumer protections. However, care must be given to protecting the privacy of the parties to an EPOA in relation to the Government's access to and use of data through the national register.

EPOAs are "private decisions made between members of the community". Government access to the information contained in such documents at an individual level, must be restricted to encourage consumer confidence in and use of the system.

A principal may also want to ensure that certain people are unaware that he or she has appointed an attorney to act on his or her behalf.

The establishment and access to information on a national EPOA register must protect privacy of parties to the agreements.

Options 1 and 3

The FPA opposes *Option 1 – The status quo* as it does not address the issues and leaves vulnerable people who qualify for and need to rely on the assistance of the attorney, exposed to potential abuse.

The FPA is concerned that *Option 3 – Voluntary registration influenced by policy/operating decisions of institutions (including financial) to not accept transactions requested under EPOA if the EPOA has not been registered* will exacerbate the issues of the current system for the following reasons:



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- While this option offers consumer protections for those who choose to register their EPOAs, it will deliver variable and inconsistent outcomes for consumers as it is reliant on each institution's policy for the treatment of EPOA requests.
- It does not resolve the transparency of EPOAs and enable institutions and professionals to confirm the currency of the EPOA as the document may not be registered
- It creates significant loopholes, potentially creating a false sense of security for principals
- It will require two systems to operate in parallel – one for EPOAs that are registered on the national register; and one for unregistered EPOAs as per the current system - which will increase the costs, confusions, complexity and risk of fraud for consumers, attorneys and third parties.

Option 3 would not deliver better outcomes than Option 2.

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