

13 December 2023

Attorney-General
The Hon Mark Dreyfus KC MP
House of Representatives
Australian Parliament House

Via email: EPOAconsultation@ag.gov.au

Dear Attorney-General

Achieving greater consistency in laws for financial enduring powers of attorney

COBA welcomes the opportunity to comment on the discussion paper on achieving greater consistency in laws for financial enduring powers of attorney (EPOA).

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has over \$170 billion in assets and 5 million customers. Customer owned banking institutions account for around two thirds of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition and market leading levels of customer satisfaction in the retail banking market. Our sector's share of ADI housing lending is around 5 per cent and our share of ADI personal lending is around 4 per cent.¹

COBA members have a wide range of business models and service many different demographics including those originating from employee groups (e.g., essential workers) or specific regional areas. The customer owned banking sector has a long history of putting our customers first.

Key points

COBA supports a national approach to EPOAs. This includes a national register for EPOAs and a national prescribed EPOA document and standard uniform clauses across all Australian jurisdictions.

Any changes to the EPOA laws should be considered against increased regulatory burden for banks.

COBA supports increased education and resources for principals, attorneys, witnesses, and organisations such as banks who act on the instructions of an EPOA.

¹ APRA's Quarterly Authorised Deposit-taking Institution Statistics, September 2023: [Quarterly Authorised Deposit taking Institution Statistics](#) .

Consistent national approach

COBA is supportive of a uniform consistent approach to EPOA laws in Australia. This may include the creation of a national prescribed EPOA document and standard uniform clauses across all states and territories. This includes consistent witnessing, acceptance, and revocation forms. A consistent approach will assist consumers who may have a power of attorney (POA) executed in one jurisdiction that may not be recognisable in another jurisdiction, or where the principal and attorney reside in different jurisdictions.

The current inconsistencies in laws, prescribed formats and valid jurisdiction clauses result in bank staff viewing EPOAs as overly complex and presenting challenges to providing an efficient and customer-focused service. For example, acceptance of appointment of an attorney is not witnessed in South Australia but is witnessed in Victoria. Operationally, this results in different processes for each jurisdiction. A national approach would remove these practical inconsistencies. Our members also highlight the challenges maintaining up to date knowledge of regulatory amendments that impact EPOAs for each different jurisdiction.

National register

COBA strongly supports having a national register for power of attorney documents. A national register will enhance elder abuse protections while simplifying current complexities and reducing operational burden on banking staff. Currently, there is no single mechanism for banking staff to check whether an EPOA is valid or if it has been revoked. This creates a layer of operational complexities for bank staff seeking to determine whether an EPOA is valid.

A feature of a national register could include a list of individuals banned from acting as attorneys (for example, those who have been convicted of fraud related charges or domestic violence). The register could be searched and checked each time a power of attorney is executed or where there is concern about the validity of a document. Banks could be registered as an 'interested parties' and receive notifications if there were any changes to EPOAs, alerting the bank quickly and efficiently to changes in circumstances.

A COBA member has suggested that a register could include highly accurate entries to the extent that a bank would not require the original documents to be produced. This may address several issues with attorneys residing in various locations. Registration of EPOAs can also be standardised to allow bank front-line staff to easily interpret the conditions and have the necessary information readily available, without requiring legal or senior management review of a document.

We include in the Annexure a list of practical challenges with the current regime as submitted by our members to illustrate the need for a national approach with a national register.

Establishment of a national body

Another possible enhancement to the current regime could include an establishment of a national body administering a searchable register for EPOA. This body may have some of the following powers:

- Requiring a formal medical assessment for EPOAs to change status 'registered' to 'active'.
- Receiving complaints about suspected elder abuse and investigate EPOA breaches and misuse.
- Overseeing the form and registration process.
- Terminating EPOAs upon the registration of a death certificate for a principal.
- Supporting organisations who have questions or need further advice about EPOAs or specific EPOAs.

Regulatory and administrative burden on banks

Any changes to the EPOA laws should be considered against increased regulatory burden for banks. We encourage the Attorney-General's Department to consider the practical realities of administering any proposed changes and the impact on banking processes and systems.

Our members submit many practical challenges with monitoring the validity of an EPOA and preventing elder abuse at branch level. A list of practical challenges is included in the Annexure. Challenges include the complexity of the document and the lack of appropriateness, training and systems to assess the validity of each transaction. Some members have expressed concerns over bank staff being required to assess the appropriateness of some attorneys, for example, those criminally charged or the capacity of the principal. Bank staff should also not be required to make any comprehensive assessment in relation to the capacity of the principal.

Role of witnesses

Accessibility to appropriate witnesses should be promoted and effectively balanced with the need to uplift the education around the roles and responsibilities of those accepting the role of an attorney. Increased responsibility for witnesses may include witnesses ensuring that they have communicated the limitations, conditions and risks associated with entering into an EPOA.

One of our members notes that strengthening the role of the witness and that this may also reduce concerns of financial abuse, however, if the attorney is determined to commit abuse, either knowingly or not, they may shop around to find the 'best' witness.

We note that witnesses are not currently responsible for the capacity of the principal.

Protection against elder abuse

COBA is supportive of enhancements to EPOAs to further prevent elder abuse. COBA proposes the following improvements:

- **Role of attorney:** A key identified gap by banks is the perceived lack of understanding by attorneys that if the principle has capacity, they can still make decisions about their finance and the attorney should support these decisions, instead of taking broad unilateral control over the principal's finances.
- **Revocation:** Creation of a uniform EPOA revocation document, including clearer details of who can witness such documents would allow for easier revocation of an EPOA that is inappropriate or no longer relevant.
- **Triggers:** EPOAs should include review or revocation triggers to ensure that EPOAs are up to date and continue to reflect the wishes and best interest of a principal.
- **Gifts:** Enhanced disclosure and awareness of reasonable gifts clauses and their limitations. These limitations should be more clearly defined within the EPOA document itself, rather than state regulations, so that the principal and attorney can have better awareness of the scope of allowable reasonable gifts.
- **Guidance:** Industry-specific guidance and case studies on best practice and additional measures that the organisation / financial Institution can adopt to identify and react to potential elder abuse or EPOAs that are unsuitable for a customer's needs (for example, multiple attorneys who are unable to act together due to geographic distance). Clear policy and process on steps banks can

implement operationally if they suspect elder abuse. For example, freeze accounts immediately pending an investigation, timeframes outlined for investigation, formal letter to attorney etc.

Resources

COBA supports investment in education for principals, attorneys and witnesses. This may include fact sheets that provides a comprehensive overview of reading and understanding an EPOA document. We note that attorneys may genuinely not realise that their action may constitute financial abuse by a financial institution due to lack of understanding of their role's responsibilities and limitations. This lack of education generates dissatisfaction between attorneys and bank staff.

We also support additional support for bank staff and other organisations that act on the instructions of a power of attorney including:

- national guidelines for witnessing and certification (including for documents received electronically),
- additional support tools which could be referenced by all financial institutions would provide a uniform approach to assisting customers with these matters,
- information pamphlets for customers that are industry recognised,
- additional support tools which could be referenced by all financial institutions would provide a uniform approach to assisting customers with these matters, and
- prescribed information, in plain language, providing a non-exhaustive list of the power that the attorney is able to exercise if no specific terms and conditions are given in the EPOA document when the principal later struggle with capacity. For example, a warning clause for the financial institution's right to freeze a bank account and contact the public guardian office when the bank has a reasonable ground to believe the member is facing advanced dementia.

Access to justice

COBA members consistently highlight that resourcing for the relevant public guardian office in each state need to increase to allow access to justice for individuals experiencing elder abuse. Some COBA members have the perception that there are limited avenues to seek support for the bank or victim and those that can support the victim are overwhelmed with significant waiting periods.

If you wish to discuss this submission, please contact Ilana Madjar (imadjar@coba.asn.au).

Yours sincerely



MICHAEL LAWRENCE
Chief Executive Officer

Annex: Practical challenges of EPOAs in banking

Our members encounter several challenges with the current EPOA regime. These include the following:

- Cases where a principal and/or attorneys do not understand the conditions and limitations that have been included in the relevant POA document, particularly where the clauses are complex. For example:
 - Where an EPOA states that attorneys are to act jointly, however the attorneys do not live in close proximity or may even live in different states or overseas, limiting their ability to operate the bank account/s and causing a mismatch between the EPOA instructions and the actual needs of the principal and attorneys. Our members are aware of digital banks that only accept powers of attorney that allow attorneys to make decisions individually.
 - Not providing required evidence of a medical condition for the EPOA to be acted upon. Member banks often receive powers of attorney documents with this clause included, however the consumers do not understand that they must also provide the accompanying evidence.
 - Complexities in applying EPOA documents when differing attorneys and method of operations apply as powers of attorneys can run concurrently. This also adds complexity as often a family dispute is in play.
- Elder abuse may take place over small transactions over time where the immediate severity of possible abuse is low. In these cases, the banks may not be able to justify directly intervening.
- Some attorneys draw out all funds from the principal's bank account prior to the member passing to avoid the deceased estate process.
- There are challenges with monitoring transactions completed by EPOA via internet banking and system controls for EPOAs may be difficult to implement.
- It is challenging for staff to understand EPOA documents and interpret and apply the method of operation to the principal's bank account/s, due to the complexity of some documents, legal terms, and the documents not being in one standardised format. The review process is manual and onerous, with additional quality assurance monitoring required due to the complexity. More complex scenarios and EPOA documents that cannot be interpreted and resolved by front-line staff require escalation to the bank's legal or compliance teams.
- Review and interpretation of EPOA documents is made even more challenging where the document is handwritten.
- There is no sufficient clarity where there is both an EPOA and a Financial Management Order (FMO) in place for a customer at the same time, adding an extra layer of complexity around the method of operation for the account.
- There are currently no guidelines on if, and when, it would be appropriate for a financial institution to identify and recommend to a customer that a EPOA may be suitable for them and what information should be provided. For example, banks often identify existing customers who appear to be unable to manage their own money (which could be due to a disability, age or just because they lack the capacity to handle their finances). In these circumstances, an EPOA (or FMO) may be beneficial for the principal, however there is little guidance on what information banks can provide to the customer in these circumstances, or who they could be referred to for free advice.
- Banks are effectively 'acting in good faith' as they do not know whether an EPOA has been revoked, unless they are notified by the principal or attorneys.
- Family dynamics are complex. An attorney can be effectively representing another family member who is not documented in the EPOA. For example, a daughter is the attorney for her mother, but the daughter's husband is the one making the decisions behind the scenes.

- Monitoring if an attorney has been criminally charged or the capacity of a principal at the branch level is burdensome and complex.
- Bank staff members may be required to provide witness statement to police and even attendance at court in the case of vulnerable consumers.
- Some EPOAs have state specific instructions on how to assist financially, but bank systems do not have mechanisms to implement these (i.e., attorneys can act severely for most services but withdrawals >\$500 must be 2 to sign).
- The proposed adoption of five-year ineligibility period may constitute collection of sensitive information. COBA recommend that the guidance should clearly prescribe the categories of personal and sensitive information to be collected and how information can be used and disclosed.