

30 June 2021

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

Via email: nationalregister@ag.gov.au

Dear Sir/Madam

National Register of Enduring Powers of Attorney Public Consultation

CPA Australia and Chartered Accountants Australia & New Zealand (the Major Accounting Bodies) welcome the opportunity to provide comments on the above consultation.

The Major Accounting Bodies represent over 200,000 professional accountants in Australia and New Zealand. Our members work in diverse roles across public practice, commerce, industry, government and academia throughout Australia and internationally.

The Major Accounting Bodies tentatively welcome the concept of a national register for enduring powers of attorney. If implemented well it could conceivably be used for other legal documents such as general powers of attorney or medical guardian documents.

Attached to this submission are our responses to the consultation questions in the template provided by the Attorney's General Department.

For further information in relation to our submission, please contact Tony Negline, Superannuation Leader at CA ANZ at Tony.Negline@charteredaccountantsanz.com or Richard Webb, Policy Advisor Financial Planning and Superannuation at CPA Australia at richard.webb@cpaustralia.com.au.

Yours sincerely

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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 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? Yes

Do you consent to your submission being published in full (including name and contact details) on the Attorney-General's Department website?

Published submissions will not be redacted in any way and will be uploaded to the Attorney General's Department website in their entirety. If you do not wish to have your contact details published, please select 'No'.

Yes No

A National Register of Enduring Powers of Attorney

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

A National Register of Enduring Powers of Attorney (NREPoA) has the potential to reduce financial abuse because it may prevent two common avenues of abuse - namely, people able to fraudulently cut and paste documents and to use a rescinded EPoA document as if it were still valid. However we do not believe the NREPoA will significantly reduce the incidence of these fraud risks.

The NREPoA could be enhanced by enabling organisations to notify the register of suspected fraud, misuse or where the provider determines that they will not rely on an EPoA.

We note that not all organisations that need to rely on EPoAs are subject to the AML/CTF provisions so they may not have an avenue to notify of suspicious transactions.

The NREPoA will not remove other potential avenues for fraud such as identity theft, blackmail, trickery, emotional pressure and so on.

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

There are a number of potential risks with the NREPoA:

1. If the register were to be hacked which might enable those wishing to do harm to gain access to data and files held by the register
2. The cost of accessing the service is prohibitive for some potential users
3. We remain concerned that it may not adequately cater for those who are unwilling or unable to use IT systems
4. The register shuts down for critical periods or does not update promptly so that rescinded documents continue to appear as current on the register
5. The register does not contain features that enable important details about EPoAs such as when operative (and if those conditions have been met, for example on being deemed to have lost capacity and who made that decision), restrictions on the powers granted to an attorney, need for unanimity/majority decision-making if more than one attorney appointed
6. It does not solve the problem of EPoA documents being State/Territory based and the differences that arise between the various jurisdictions
7. EPoAs are used by a wide range of people not just the elderly and insufficient thought appears to have been given to considering how others use these documents
8. Why the limitation on only having EPoAs on the register? Why not also include General Powers of Attorney? Why not include a wider range of documents such as guardianship and care directives?

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?

If it is deemed desirable to establish the NREPoA then it also must be available to all Australians regardless of their cultural background, ability to communicate in English and where they choose to live or work. Those in rural and remote areas struggle to access online systems, such as internet banking. Knowledge about how to use such systems can be lower in remote region than found in bigger metropolitan centres. These issues present major challenges for the NREPoA.

AUSTRAC has identification protocols in place for dealing with people who may be challenged when providing sufficient identification, and several of these have been adopted by the ATO when dealing with folks in communities. This should be investigated to determine if it could apply to the NREPoA.

The Public Consultation paper states that the NREPoA will use a digital first approach and will provide offline services where a function cannot be delivered online or users prefer to deal with a non-digital path. However we have no detail on how this would function. We would need more detail before providing feed-back on these design features.

In any event members of the Major Accounting Bodies in public practice are often trusted advisers, work throughout the nation including in rural and remote areas and hence are well placed to help the clients navigate usage of this the NREPoA.

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?

In broad terms we support the proposed access arrangements in Sec 3.2.6. Our major concern is the potential definition of financial institution. A balance would need to be found between permitting too many people access to the NREPoA and the information it holds thereby increasing the potential for fraud and having too few access the register and creating inefficiencies. Careful consideration would need to be given to which financial institutions would be permitted to access the NREPoA and those that would need to seek specific permission from principals and/or attorneys.

If access is to be allowed by approval of the attorney:

1. Will all attorneys have to provide approval if they must all exercise their power unanimously?
2. How will someone relying on attorney approval know that the approval has actually been granted by the attorney and the attorney possesses the necessary powers under the EPOA?

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?

The register should be available to accountants in public practice under the same rules applying to financial institutions because accountants often need to access such documents on behalf of their clients.

There are a range of other entities (not commonly understood as financial institutions) that may need to verify these documents. For example, local newsagents, utility companies, government agencies or health care providers.

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

1. Demonstrate the need to complete a commercial transaction, ensure regulatory compliance with various laws such as tax and super or appropriately manage the principal's affairs and the person needs to see a specific document - this may require the completion of a statutory declaration and suitable penalties if seeking to gain capricious access to documents
2. Confirm the powers conferred on the attorney are correct

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?

Access outside the categories that require access (see above) should only be provided if the principal (or attorney if an EPoA is active) has provided approval by issuing an access key. The key should have to be activated within 14 calendar days of it being issued.

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

Urgent access might be necessary to ensure time critical medical care for the principal can be paid for. It might also be essential to ensure specific commercial transactions or regulatory compliance activities can be undertaken or completed (such as settling property transactions or enabling the principal to move into aged care accommodation).

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?

The applicant can always seek approval from the principal or the attorney and gain access to documents that way. If access is denied at that point then an appeal to the relevant State/Territory administrative tribunal should be permitted.

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?

It is highly likely there are out of the ordinary reasons where access should be given in these circumstances. Suspected fraud maybe one need for access by law enforcement or other relevant government agencies. In our view such access should only be granted by the relevant State/Territory administrative tribunal.

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

At this point in time we do not believe the NREPoA will obviate the need to sight the original or a suitably certified copy of the original EPoA.

However being able to view an imaged copy may be useful. It may enable the user to confirm that the document they are being asked to rely on is the most recently executed document. (However it will be

impossible for someone accessing the online document to be sure that the document lodged on the National Register is not fraudulent.)

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

This will depend on who wishes to interrogate the register. We believe that it may be helpful to see a historical trail of executed documents by an individual.

At this point in time we do not think it is important to allow interrogation. In our view interrogation of the database should only be possible with the approval of a relevant State/Territory administrative tribunal.

Making phase

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

We do not believe an electronic EPOA is possible at this point in time. Most organisations will only accept an EPOA as valid and effective if they can view the executed document of the relevant "wet signature" of a certified copy.

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

It should be up to the principal and their legal advisers to ensure the NREPOA reflects the contents of the executed document.

Problems will arise where an individual elects to execute such a document without seeking advice. We note that it is intended that the register will contain an "educational element". We see this as problematic and it is likely this will be seen by many users as providing them with quasi-legal advice.

Lodgement phase

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

A principal and their legal advisers should be permitted to lodge EPOAs for registration. Attorneys should be similarly permitted to lodge EPOAs for registration if they have sufficient power to do so.

We do not believe the potential for fraud at this point can be eliminated.

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

At face value there is merit in checking that only EPOAs have been lodged with the register. However an individual or organisation that does more than checks or verifies documents have been completed correctly could potentially be seen to be providing advice (legal or otherwise) to those who have made a mistake in a document's contents.

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

Online, post and in person should all be possible methods of lodging documents on the NREPoA.

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

At this point in time we do not believe so.

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

Lodging any document online contains risks of fraud. However some of these can be mitigated by the use of multi-factor authentication (such as that used for MyGov, MyGovID and so on).

Registration phase

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

We do not agree that EPOAs must be registered before first use. There will be some attorneys who will not benefit from having their EPOA on a national register and they should be free to make this judgement. They can always change their mind at a later date.

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

This should be a matter for the principal and their legal advisers.

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

Proof of identity should be proved in the normal way - that is, similar to MyGov, MyGovID, renewing a passport, opening a bank account and so on.

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

Proof of identity via MyGov ID should be sufficient.

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?

If an EPoA has been placed onto the register then equally its revocation should also be placed on the register. Without this step it will be possible for an attorney to continue to use that document, potentially against the express wishes of the principal, as if it were still valid.

Revocations should be lodged by a principal or their legal representatives or at the direction of appropriate State/Territory tribunal

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

In force, revoked, suspended, subject to challenge

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?

We do not understand why arrangements for historical EPoAs would not be the same as that applying to those made after the register commences.

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?

As we do not agree that all EPOAs must be registered to be effective we do not agree that those registered on state/territory registered also need to be on the proposed NREPoA. If a state or territory government decides to close its current registry service then users of that system should be transferred to the NREPoA free of charge.

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

It cannot be expected that law firms perform this work pro bono. Many people may want to use any contact as "good a time as any" to seek advice about their current documents. Again this task cannot be performed pro bono. And many clients might expect their law firm to complete the administrative work of placing the document on the register. Again this should not be pro bono work. These are all reasons why we do not think use of the NREPoA should be mandatory.

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?

We do not believe so.

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?

No response

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?

MyGov, financial institutions, airline loyalty programs all alert users if their account has been logged into. Some banks can provide updates to clients on account activities. We think all these features would be important for the NREPoA.

Options to address dual registration

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

No response

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

No response

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

No response

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 response

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

No response

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 response

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)?

No response

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

No response

Safeguards

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

We are concerned how the NREPoA will be used by those who are challenged from a literacy perspective. We believe it will be a significant challenge to enable them to effectively access the system.

The register could be enhanced with manual backup processes such as telephone assistance and suitably qualified staff at Services Australia offices.

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

We are concerned how the NREPoA could be used by family violence perpetrators. We believe it will be a significant challenge to enable them to effectively access the system?

The register could be enhanced to enable reporting of suspected family violence incidences.

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

We believe the current design of the NREPoA does not provide any safeguards for those suffering elder abuse.

The register could be enhanced to enable reporting of suspected elder abuse incidences.

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?

See our response above.

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?

In order to avoid fraud and other problems the registration process will have to contain some unavoidable complexities. The alternatives are the very issues the NREPoA is seeking to mitigate.

Additional comments welcome

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