

ACCOUNTING TIMES

Just how many attorneys does it take to create authority?

By Matthew Burgess

With inconsistent EPOA rules across different states likely to remain an issue for some time, having EPOAs in more than one jurisdiction is still the safest option for some clients.

As flagged in other recent articles in this publication, a number of professional bodies have welcomed proposed measures by the government to improve the harmonisation of the enduring powers of attorney (EPOA) regime across Australia.

The issues of what EPOA documentation is required when someone has assets or spends time in more than one state around the country has been ongoing for many years.

The question is particularly prevalent in communities near State borders. However it can potentially arise in any situation. Indeed, the issue can also arise across international borders.

The general consensus of those regularly advising in this area, is that at least within Australia, the EPOA legislation is frustratingly inconsistent, with completely different rules applying in each Australian jurisdiction.

Furthermore, even within states, there seems to be a desire by the regulatory authorities to constantly 'tinker' with EPOA legislation and approved forms.

In theory, the inconsistency between states is currently addressed by legislation requiring each jurisdiction to recognise the documentation prepared in each other state.

In practice, however, it is often extremely difficult to convince third parties that a EPOA document that looks completely different to what they normally expect to see is in fact legally binding.

One solution (although admittedly not a particularly efficient one) often implemented is to have a separate EPOA prepared under each jurisdiction where a person is likely to spend significant periods of time. While not a perfect remedy, this approach can provide significant practical benefits and counterintuitively is often the most cost effective strategy.

It is important to note that various proposals have been made historically, as part of having uniform succession legislation across Australia, for the EPOA laws to be made consistent. The timeline for achieving such an outcome is difficult to predict given the number of vested interests involved, however the attempts already stretch back over many years and thus there must be some concern that the 'Lindy Effect' applies (that is the longer a situation has existed the longer it will continue to exist).

As noted above, although each state has legislation in operation to acknowledge EPOA documents from other States, the issue of acknowledgement would appear to be a practical one.

As one example, given the NSW documents are only a few pages and the Queensland document can be up to 20 pages long, it is easy to see how confusion could ensue.

Thus, at least for the foreseeable future, the conservative approach is likely to remain having EPOAs in more than one jurisdiction where there is a realistic possibility that a person may need to be having things implemented in two or more jurisdictions regularly.

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In adopting the approach of preparing a document in each jurisdiction that a person has significant assets or spends significant time, it is generally seen as best practice to include 'duplication acknowledgement' wording.

Some example base wording in this regard is as follows:

For the avoidance of doubt I confirm that I have executed an Instrument Appointing an [#Name of medical EPA in relevant jurisdiction eg Enduring Guardian] pursuant to the [#insert relevant state act] ('the [#insert state acronym eg NSW] [#Name of medical EPA in relevant jurisdiction eg Enduring Guardian]') for any matter that requires signing by an [#Name of medical EPA in relevant jurisdiction eg Enduring Guardian] duly appointed by the laws of [#Insert state eg New South Wales].

By this Power of Attorney for personal and health matters ('the [#insert state acronym eg QLD] [#Name of medical EPA in relevant jurisdiction eg Power of Attorney for personal and health matters]) I appoint my Attorneys in respect of any personal or health matter not strictly required to be signed by an [#Name of medical EPA in relevant jurisdiction eg Enduring Guardian] appointed by the laws of [#Insert state eg New South Wales].

To the extent there is any inconsistency or overlap between the [#insert state acronym eg QLD] [#Name of medical EPA in relevant jurisdiction eg Power of Attorney for personal and health matters] and the [#insert state acronym eg NSW] [#Name of medical EPA in relevant jurisdiction eg Enduring Guardian], the [#insert state acronym eg NSW] [#Name of medical EPA in relevant jurisdiction] is to prevail and the [#insert state acronym eg QLD] [#Name of medical EPA in relevant jurisdiction eg Power of Attorney for personal and health matters] is to be modified (and its operation suspended to that extent only) for such time as the [#insert state acronym eg NSW] [#Name of medical EPA in relevant jurisdiction eg Enduring Guardian] remains in existence.

In all other respects the [#insert state acronym eg QLD] [#Name of medical EPA in relevant jurisdiction eg Power of Attorney for personal and health matters] shall apply and remain in force.

Importantly, a unification of rules across the country may also see elimination of state based idiosyncrasies.

For example, the witnessing requirements are inconsistent in every state, with some states in fact imposing fundamentally different rules. At one end of the spectrum NSW essentially mandates that lawyers must witness EPoAs, whereas in WA there are dozens of categories of eligible witnesses, including virtually all professions.

As a further example, in WA many specialist advisers recommend 2 versions of an EPoA be crafted by each person to broaden the powers available to appointed attorneys.

A 'tailored' version includes provisions that ensure the EPoA is structured to achieve a number of key elements not included in the template state government form and is crafted so as to not revoke the 'standard' version - and vice versa.

The need for this approach is due to the Land Titles Office generally refusing to register EPoA documents that contain the additional provisions. The standard version of the EPoA can therefore be the document that is registered with the Land Titles Office, as necessary.

Ultimately, the current state based rules in relation to EPoAs are arguably a modern day example of the George Bernard-Shaw observation that all professions are a conspiracy against the laity.

