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Adviser reminder of cross-border complexities on client incapacity

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

Implementing separate powers of attorney under each jurisdiction where assets are owned, or where they are likely to spend significant periods, is one solution to try and ensure that EPAs can operate across jurisdictions, a legal specialist has said.

Matthew Burgess, director of View Legal, said that as life expectancy increases, managing the consequences of this, such as mental frailty and incapacity, can become difficult when advising for estate planning.

"While each Australian jurisdiction has legislation enabling the granting of legal authority to an attorney that endures past the point of incapacity, the laws in each state are consistently inconsistent," Burgess said.

"In theory, there is also legislation requiring each other jurisdiction to recognise the documentation prepared in each of the states. In practice, however, it is often extremely difficult to convince third parties that a power of attorney document - that generally looks radically different to what they normally expect to see - is legally binding."
This is despite case law supporting cross recognition, Burgess said, such as the decision of MS [2025] WASAT 49 in which an attorney under a NSW enduring power of attorney applied for it to be recognised in WA.

In this case, the relevant WA enabling legislation specifically confirmed that the state tribunal may make an order recognising a power of attorney from another jurisdiction as an EPA in WA, if it is satisfied that a power of attorney created under the laws of another state, territory or country corresponds sufficiently, in form and effect, to a power of attorney created in WA and that it is appropriate to do so.

"In a detailed consideration, the tribunal stepped through a number of points before allowing the NSW EPA to be recognised in WA," Burgess said.

"These included that the power of attorney was validly created under the laws of NSW and whether it corresponded sufficiently in form and effect to a power of attorney created under the WA legislation.

"If the answers to the first two questions were 'yes', the court had to then consider whether it was appropriate that an order be made recognising the NSW EPA in WA."

Burgess added that the fact that the application was even required and that the initial application was rejected before a successful appeal reinforces that it may often be the path of least resistance to ensure a separate EPA is implemented in each jurisdiction where authority is likely to be needed.

"Interestingly, the case here was further complicated by handwritten changes to the EPA, which were not initialled by all parties."

"The Tribunal held that this oversight did not invalidate the document, however, such an outcome may not always be the case (ZPP v ZPO [2020] NSWCATAP 288). Additionally, the donor stated that the EPA was to only commence operation 'If and when I don't have capacity to make rational decisions as certified by a

medical practitioner' and this requirement led to a lengthy analysis of whether the condition had been met."

Burgess said the recommendation of some specialists is that EPAs should always commence immediately, rather than run the risk that the authority otherwise created by EPA may not exist at the exact moment it is required.

"One solution, although admittedly not a particularly efficient one, is the implementation of a separate power of attorney under each jurisdiction where assets are owned, or where they are likely to spend significant periods."

"While not a perfect solution, this approach can provide significant practical benefits. Since at least the early 2000s there has been a push, as part of having uniform succession laws across Australia, for the power of attorney laws to also be made consistent.

"The timeline for achieving such an outcome is difficult to predict given the number of vested interests involved and the number of years the concept has remained as nothing more than a discussion point."