

# Towards Harmonisation

## Key model provisions of financial enduring powers of attorney legislation (December 2021)

Each of Australia's states and territories currently has its own legislation concerning the creation and operation of financial enduring powers of attorney. All of these laws are broadly similar, but each has local variations.

The Australian Law Reform Commission, in its 2017 report *Elder Abuse: A National Legal Response*, recommended the development of a national enduring documents register after there is agreement, among other things, on nationally-consistent enduring powers of attorney laws. The National Plan to Respond to the Abuse of Older Australians [Elder Abuse] 2019–2023 commits state and territory governments to consider harmonisation of these laws.

Harmonisation would assist in combatting elder abuse by enabling:

- greater knowledge and certainty to exist throughout the country on enduring powers of attorney creation, usage and safeguards;
- meaningful national education on enduring powers of attorney to occur;
- increased consistency to be achieved in the practices and expectations of institutions which recognise enduring powers of attorney (such as banks and other financial services providers); and
- the forthcoming national register of enduring powers of attorney (which is currently being developed) to be optimally effective.

A first stage in achieving harmonisation of financial enduring powers of attorney laws is agreement on key legislative provisions. This document draws on existing laws in describing nine key model provisions.

### 1. Execution (and revocation)

- Signed by the principal, or someone at their instruction; witnessed by at least one authorised witness, who certifies that the principal is acting voluntarily and appears to understand the instrument's nature and effect.

### 2. Appointments

- One or more attorneys and alternate attorneys, with multiple attorneys presumed to be acting jointly unless otherwise specified;
- Acceptance of appointment signed by the attorney, with at least one authorised witness certifying that the responsibilities of the role were explained to the attorney, who appeared to understand them.

### 3. Eligibility

- An attorney (or alternate) cannot be a paid carer of the principal, bankrupt or insolvent, or have been convicted of an offence involving dishonesty or violence.

### 4. Activation

- The principal can choose when the instrument takes effect (e.g. when the principal can no longer make their own financial decisions); if no choice is specified, then it takes effect upon execution.

### 5. Duties of attorneys

- These include: to act in good faith, to ascertain and promote the principal's preferences and interests, to avoid conflicts of interest, and to keep records.

### 6. Offences

- Dishonest inducement, usage or representation.

### 7. Compensation

- Payable for a breach of duty by an attorney.

### 8. Revocation

- The principal must advise any attorney of a revocation by them.

### 9. Interjurisdictional recognition

- Interstate execution and revocation of enduring powers of attorney are recognised.