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**THE NHMRC PARTNERSHIP CENTRE ON DEALING WITH  
COGNITIVE AND RELATED FUNCTIONAL DECLINE IN OLDER  
PEOPLE (CDPC)**

**FINAL REPORT: THE POLICIES AND PRACTICES OF FINANCIAL  
INSTITUTIONS AROUND SUBSTITUTE DECISION MAKING**

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## 1 Executive Summary

A person's right to make decisions is fundamental to their independence and dignity. If older people lose mental capacity, personal health and financial decisions will need to be made for them, in other words a substitute decision maker may need to be appointed. It is crucial therefore that older people have access to adequate and appropriate substitute decision making tools.

This research report investigates and assesses the effectiveness of the power of attorney (POA) tool, in particular the Enduring Power of Attorney (EPA). To assess this, the main parties involved in the execution of POAs, and their role are explored, as well as the tool itself. The main parties include the principal, the attorney, financial institutions and various Government organisations associated with substitute decision making and financial matters. This report examines the role of all of these parties, however, the focus is on the role of the "holder" of the principal's funds, that is, the financial institutions, as they make the final decision on whether to allow the attorney access to the principal's funds. The policies and practices of financial institutions in regards to POAs, in particular the EPA, are investigated in order to ensure the adequacy of this tool to create better outcomes for older people.

Therefore, the overall aim of the Activity was to investigate the policies and practices of financial institutions in NSW with regards to substitute decision making instruments, in particular powers of attorney. This included determining:

- the knowledge of financial institutions in regards to financial substitute decision making instruments (in particular powers of attorney);
- the knowledge of consumers (principals and attorneys) in regards to financial substitute decision making instruments;
- the recognition given by financial institutions of substitute decision making tools (in particular powers of attorney); and the effectiveness of the policies of financial institutions in regards to substitute decision making tools.

The research was conducted using depth interviews with attorneys (consumers), financial institutions and government bodies. The consumer sample included people who lived in NSW who, in the last ten years, (since the introduction of the *Powers of Attorney Act 2003* (NSW) had been appointed an attorney (either general or enduring), or financial manager, and have acted in their role as attorney or financial manager with a financial institution. Fifteen consumer depth interviews were conducted. The financial institution sample included two of the major banks in Australia. The governing bodies included were the New South

Wales Trustee and Guardian, Land and Property Information, (NSW), New South Wales Guardianship Tribunal (now known as Guardianship Division of NCAT), and the Commonwealth Financial Ombudsman Service.

The research concludes with the following eight recommendations.

#### Financial institution handling of substitute decision making policies

- Financial institutions should make substitute decision making policies a priority; reviewing and evaluating these policies regularly, with the aim of implementing effective policies (for themselves and their customers).
- Financial institutions should ensure that their policies are filtered down, understood and used appropriately by frontline staff (tellers, phone staff and branch managers).

#### Financial institutions third party signatory and co-signatory policies

- Production of a valid enduring power of attorney should be made mandatory when authorising third party signatories/co-signatories.

#### Education and training for frontline staff

- Senior staff through to frontline staff should receive ongoing education about cognitive decline in particular, how to deal with customers who have a diagnosis of dementia, their attorneys and carers.

#### Educate customers and the general public

- Financial institutions should become advocates for and encourage customers to have an enduring power of attorney, and
- Provide information on their website, and in their branches, on the importance of enduring powers of attorney.

#### Database

- Financial institutions should have a centralised database in which to store customer powers of attorney, and accessible by the necessary staff (tellers, phone staff and branch managers).

#### National Register for Powers of Attorney

- Financial institutions, consumers and relevant organisations should lobby the federal government for a national register of substitute decision making instruments.

## Online banking

- Tighter restrictions by financial institutions should apply to accessing a principal's account through online banking, to help minimise the occurrence of financial abuse.
- Financial institutions to provide online banking options that allow for joint attorneys.

## Implementation of the House of Representatives Inquiry Recommendations

- All recommendations, as stated in the 2007 House of Representatives Standing Committee on Legal and Constitutional Affairs Report *Older people and the law*, are supported, in particular those relating to fraud and financial abuse and substitute decision making. It is envisaged that if the recommendations were implemented this would assist in providing greater security for both financial institutions and consumers in respect of recognition and implementation of substitute decision making instruments.

## 2 Introduction

As people age there is an increased risk of developing some form of cognitive impairment. Research has shown that in 2011, in New South Wales, there were 91,308 people with a diagnosis of dementia, and that this was projected to increase to 303,673 people by 2050).<sup>1</sup> This diagnosis, which leads to limited or diminished mental capacity, makes it difficult for some people to make decisions about their personal, health and financial matters. A persons' right to make decisions is fundamental to their independence and dignity. If older people lose mental capacity, personal, health and financial decisions will need to be made for them, in other words a substitute decision maker may need to be appointed. It is crucial therefore that older people have access to adequate and appropriate substitute decision making tools.

The focus of this report is the financial substitute decision making tools currently available in New South Wales. State/territory laws in Australia allow people, while they have mental capacity, to appoint someone to make financial decisions for them, should they be unable, or unwilling, to look after their own financial affairs. The tools to enable this process to occur are known as Powers of Attorney (POA). Powers of Attorney can be General or Enduring. A General Power of Attorney (GPA) is usually for a specific transaction or may be for a limited period of time. The important difference between a General Power of Attorney and an Enduring Power of Attorney (EPA) is that once a person loses mental capacity then a General Power of Attorney is no longer effective. It is essential therefore to ensure that a principal (the person appointing someone as their attorney to manage their affairs) appoints the attorney pursuant to an EPA.

However, for most people, thinking and planning for the possibility of cognitive decline (and the financial consequences of this) is not common practice. Consequently, only a small proportion of people have in place a formal substitute decision making tool. In fact it is estimated that only approximately 11 per cent of Australians have a valid EPA.<sup>2</sup> It has been suggested that this low incidence may be due to a lack of awareness and understanding of EPAs, the tool's complexity and the idea of losing mental capacity being an unfavourable thought for consideration by many.<sup>3</sup> Furthermore, as there is generally no requirement to

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<sup>1</sup> Deloitte Access Economics, 'Dementia Across Australia, 2011 – 2050'. Report prepared for Alzheimer's Australia, 9th September 2011.

<sup>2</sup> Office of the Public Advocate Queensland, *Submission No.76*, p7 as cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 'Older People and the Law' (2007), p71.

<sup>3</sup> Office of the Public Advocate Victoria, *Submission No.70*, p14, *ibid* p72.



register the instrument (unless the attorney intends to engage in property dealings) then the figure can only remain an estimate.

It has previously been noted that in place of using formal substitute financial decision making mechanisms, many older people use informal arrangements with family, friends or carers.<sup>4</sup> These arrangements usually take the form of an older person giving a family member or carer their Automatic Teller Machine (ATM) pin number or online banking log in and password (with no restrictions in place). Unfortunately these types of arrangements can render an older person vulnerable to financial abuse. Although exact figures relating to the incidence of financial abuse are not available it has been noted that there is an increase in the number of people who have been victims of some form of financial abuse.<sup>5</sup>

The main problem with informal arrangements is the lack of accountability on the part of the family member, friend or carer. In other situations, an older person can simply be 'caught off guard', with neither a formal nor informal arrangement in place. In such situations an interested person, or party, will make an application to the relevant Guardianship Board/Tribunal for the appointment of a financial manager. This person (the financial manager), will then make the financial decisions for the person and could be someone who they may not have chosen while they had mental capacity.

The 2007 House of Representatives Report highlights the fact that there are a number of issues associated with POA legislation and the documents themselves.<sup>6</sup> The issues affect the credibility and adequacy of the tool not only for the attorney, and subsequently the principal, but also for those persons or organisations who rely on the validity of the instrument itself. In fact, it has been noted in the House of Representatives Report that some financial institutions do not recognise or honour powers of attorney.<sup>7</sup> Some financial institutions require an attorney or principal to complete other forms exclusive to the financial institution.<sup>8</sup> This means that the financial institution's own substitute decisions making instruments appear to negate the need for a power of attorney. However, given that there are major issues with the POA tool, it is not surprising that financial institutions are implementing their own substitute decision making policies and forms, which give them a

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<sup>4</sup> Carer's Queensland, *Submission* No. 81, p1 *ibid* p84.

<sup>5</sup> This was noted in several submissions to the House of Representatives Inquiry, as cited above, p15.

<sup>6</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 'Older People and the Law' (2007), p73.

<sup>7</sup> *Ibid*, p106.

<sup>8</sup> Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p5 as cited in House of Representatives Report, *idem*.

degree of confidence in the validity of their instrument – which is not necessarily found in the power of attorney document.

This additional requirement imposed by the financial institutions on customers with a power of attorney has the potential to cause stress and frustration to the attorney particularly if the principal has already lost capacity.

There are, however, fundamental problems with financial institutions using their own substitute decisions making tools. In the case of the third party signatory form, there are no checks to ascertain that the customer has the requisite mental capacity to give financial authority to another person. Notwithstanding that there is a presumption that all adults have capacity, this presumption can be rebutted in the presence of a valid trigger. Such a trigger may not be readily apparent to someone who may not have to satisfy themselves that the customer has the requisite mental capacity to give financial authority to a third party. However, the witness to an enduring power of attorney certifies that the principal “appeared to understand” the document and its powers.

The House of Representatives Report, referred to above, pointed out fundamental flaws associated with the substitute decision making legislation and made a number of recommendations to address these deficiencies. However, to date the majority of the recommendation have not been acted upon. The following points summarise these flaws as outlined in the Report:-

*Verifying the validity of the power of attorney form:*

Currently a power of attorney is not registered in a central database that can be accessed by a financial institution or other relevant bodies. Therefore the validity and credibility of the document is compromised making it impossible for a financial institution to verify if the form is valid and has not been superseded. It therefore becomes a financial risk for a financial institution to solely rely on a POA document. A national registry would allow for verification of the form. It should be noted that Recommendation 20 in the Report states that:

“The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a national register of enduring powers of attorney. . .”

*Powers of Attorney are governed by state laws:*

Each state and territory within Australia has its own substitute decision making legislation, and as to be expected there are variations between the jurisdictions. Notwithstanding these variations each jurisdiction, has within its legislation, a section recognizing the instrument made in another jurisdiction. However, this recognition is qualified by the fact that the instrument must be valid in the originating jurisdiction and there must be similar provisions in the legislation of the “new” state/territory. Most financial institutions are national and have national policies, therefore it can be difficult for financial institutions to correctly recognise powers of attorney from another state/territory. In addressing this situation the Report made three Recommendations:-

Recommendation 16 states: “. . . that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of uniform legislation on powers of attorney across states and territories.”

Recommendation 17 states: “. . . the Australian Government propose that the Standing Committee of Attorneys-General monitor the implementation of mutual recognition provisions in power of attorney legislation and encourage members to amend legislation where appropriate to maximise the portability of the instrument, prior to the implementation of uniform legislation.”

Recommendation 22 states: “. . . that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a campaign to raise awareness of the purpose and intentions of enduring powers of attorney in financial institutions.”

*Capacity:*

Although there are options as to when the Enduring Power of Attorney will come into effect, notwithstanding these options it will always come into effect permanently when the principal loses capacity. However the definition of capacity is not clearly defined in the New South Wales Enduring Power of Attorney form (nor the legislation). What is written in the form under the Section 19 Certificate and signed by the prescribed witness is “b). The principal appeared to understand the effect of this power of attorney.” It is from this statement that a third party can rely on the fact that the donor (or principal) had capacity at the time that the instrument was executed.

In addressing the particular issues associated with capacity, the Committee in Recommendation 19 stated that: “. . . the Standing Committee of Attorneys-General and the

Standing Committee of Health Ministers develop and implement a nationally consistent approach to the assessment of capacity.”

#### *Powers of Attorney and Accountability*

The Report also looks at the issue of accountability (or lack thereof) on the part of the attorney. In fact the Report states “The making of an enduring power of attorney does not necessarily better protect the interests of an older person than under informal family care arrangements.”<sup>9</sup> The Public Trustee of Queensland “. . . identified powers of attorney as the main source of financial abuse.”<sup>10</sup> Furthermore, it was reported by ARAS [Aged Rights Advocacy Service] that “. . .17% of these [elder abuse] cases related to the improper use of enduring power of attorney.”<sup>11</sup>

When looking at some of the power of attorney forms it can be seen how the instrument itself is conducive to abuse of the instrument. For example the NSW Enduring Power of Attorney form provides a number of options as to when the instrument will take effect. Included in these options is s4 (c) “Once my attorney considers that I need assistance managing my affairs.” It is easy to see how this would facilitate the actions of an unscrupulous attorney, to the obvious detriment of the principal. This situation is further compounded by the fact that there is no requirement for an attorney to present audited accounts and in fact there is no inbuilt checking mechanism on the attorney’s management of the finances of the principal.

The federal government responded to the 48 recommendations put forward in the *House of Representatives Report*, however, few of the government responses indicated a course of action.<sup>12</sup> It is noted though that the Australia Bankers’ Association (ABA) responded by increasing and improving the content of POA information on its website.

Financial institutions appear to have created policies to overcome problems with POAs in order to protect their own interests and these policies unfortunately do not necessarily protect the interests of their customers – they may in fact inadvertently serve to make elder financial abuse easier. It is recognised that if the provisions of the New South Wales *Powers of Attorney Act, 2003* were more stringent then financial institutions would not necessarily

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<sup>9</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, ‘Older People and the Law’ (2007), p 81.

<sup>10</sup> Office of the Public Advocate Queensland p8 *idem*

<sup>11</sup> ARAS, *Submission No 38*, p2 *idem*

<sup>12</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs ‘Older People and the Law’, Government Response, 2009.

need to implement their own substitute decision making tools, (for example, authorised third party signatories).

While there clearly are issues with POAs, this report mainly focuses on the policies and practices of financial institutions regarding POAs and substitute decision making. Although it must be noted that the policies created by financial institutions and the problems with POAs are related – financial institution’s policies may in fact be influenced in part by issues with the POA form and Act. This report does, however, by association also investigate the implications of the government not addressing the recommendations of the *House of Representatives Inquiry* and supports these recommendations (in particular; uniform national legislation, a national registry and clear definitions of capacity). The current situation has given rise to the need for investigation into policies and practices of financial institutions in regards to powers of attorney, and the implications of these policies. It has become imperative to investigate the effect these policies have on the principal and attorney, with the aim of recommending policy and procedure changes to create better outcomes for older people with cognitive decline and those who care for them.

### **3 Objectives**

The overall aim of the Activity was to investigate the policies and practices of financial institutions in NSW with regards to substitute decision making instruments; in particular powers of attorney, in order to recommend policy and procedure changes to create better outcomes for older people. This included determining:

- the knowledge of financial institutions in regards to financial substitute decisions making instruments (in particular powers of attorney);
- the knowledge of consumers (principals and attorneys) in regards to financial substitute decisions making instruments;
- the recognition given by financial institutions of substitute decision making tools (in particular powers of attorney); and
- the impact of the policies of financial institutions in regards to substitute decision making tools on the consumer.

## **4 Methodology**

### **4.1 Consumers**

#### **4.1.1 Sample and Method**

The sample included people who lived in NSW who, in the last ten years, had been appointed an attorney (either general or enduring), or financial manager, and have acted in this role with a financial institution. In total, 15 respondents were interviewed. Face-to-face (semi-structured) in-depth interviews taking between 60 to 90 minutes were conducted with participants between September and October 2014 (one interview was conducted by telephone).

### **4.2 Financial Institutions**

#### **4.2.1 Sample and Method**

The sample included financial institutions within NSW. Two financial institution industry associations; the Australian Bankers Association (ABA) and the Customer Owned Banking Association (COBA), were approached to support and assist by recruiting their members for interviewing. The ABA agreed to participate in the Activity; however COBA declined, therefore only Banks were interviewed. Two major banks agreed to participate. One bank responded to an email survey of semi-structured questions while the second bank agreed to a one hour in-depth (semi structured) telephone interview. Interviews were conducted in August 2014.

### **4.3 Government Departments**

#### **4.3.1 Sample and Method**

The following government departments: New South Wales Trustee and Guardian, Land and Property Information, New South Wales Guardianship Tribunal (now known as Guardianship Division of NCAT), and the Commonwealth Financial Ombudsman Service were interviewed via telephone or email between June and August 2014. The survey included semi-structured, open ended questions.

## 5 Findings and Discussion

### 5.1 Consumer Participants

Consumer participants (attorneys) were asked a series of open-ended questions regarding their role as attorney, pursuant to the powers of attorney instrument, and their dealings with financial institutions.

#### 5.1.1 Who the Powers of Attorney were for

Of the 15 people who participated in the research, most were attorneys for their parents (mother and father) (4), followed by the participant's Mother (3), Husband (2), Children (2), Father (1), Sister (1), Aunt (1), Great Aunt (1), Great Uncle (1), Son-in-law (1). All held either an enduring or general power of attorney, and as can be seen some participants were an attorney for more than one person and in some cases were appointed to act in conjunction with another person.

#### 5.1.2 Financial Institutions that attorneys dealt with

The individual participants had dealt with between 1 to 4 financial institutions whilst acting in their roles. These financial institutions included one credit union and small and large banks (including what is generally known as the 'big four'<sup>13</sup> banks).

#### 5.1.3 Participant knowledge of Powers of Attorney

Participants were asked to describe what a Power of Attorney (both general and enduring) meant and what it allowed them to do as attorneys. Only 2 of the 15 participants correctly defined an Enduring Power of Attorney (EPA). A number of participants believed that an EPA gave them the authority to make health and welfare decisions on behalf of the principal if they lost capacity. Furthermore, some participants admitted that they were not sure of the exact definition or authority granted to them as attorneys, by powers of attorney. Responses to this question included:

*'I had an EPA to assist in making health decisions for my mum, who was in a nursing home for many years before she died earlier this year. The EPA gives me the right to look after finances, well-being choices and other health decisions on behalf of my dad.'*

*'I don't remember exactly what the POA says, but I know that my Mum's one only includes financial representation, for my dad it includes lifestyle, medical, property and financial authority.'*

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<sup>13</sup> Australia and New Zealand Banking Group, Commonwealth Bank of Australia, National Australia Bank and Westpac Banking Corporation



*'I have never had two people give me the same definition of an EPA, not even the solicitors or the banks. I think it has to do with cognitive ability of the principal. When the principal loses the ability to make decisions I can make decisions on their behalf'.*

*'Maybe the EPOA should have very clear information that says something about it being a document for the use of financial transactions and relevant decision making'.*

*'Mostly I'd like the solicitors to take more responsibility in explaining all the implications and details related to POA and EPOA. I'm still not clear about the differences between the two'.*

The fact that some participants believed they were able to make health and welfare decision on behalf of the principal (once capacity was lost) highlighted an important problem as this confusion and lack of knowledge may influence their decision for the perceived need for an Enduring Guardianship. Adding to this, the lack of clarity means that many attorneys are not aware of their rights and responsibilities when attempting to act in their role as attorney. The knowledge deficit of attorneys may be due to solicitors not clearly explaining (and a reluctance on the part of the attorney to seek clarification), or an insufficient explanation on POA forms. It could also be the length of time between the appointment and the initial use of the instrument.

#### **5.1.4 Financial Institution frontline staff's handling of powers of attorney forms**

Overall, it appears that some financial institutions do not have policies for dealing with POA forms, or that these policies are not being adequately communicated or 'fed-down' to frontline staff.

##### **Poor staff knowledge of POAs:**

The research showed that a considerable proportion of frontline financial institution staff were not familiar with the POA form and did not know what to do with it when it was presented to them by an attorney. When this was the case, frontline staff normally asked for assistance from the branch manager (who also did not always know what to do with the form, nor how to correctly 'lodge' it within their internal system, which caused problems later).

*'More staff training is needed, baby boomers are ageing, there will be a lot of people acting for them. Banks need to equip staff with the right knowledge. Nine times out of ten you will have to deal with someone else besides the person that you originally asked for'.*

*'Banks should nominate dedicated staff at each branch or even in a branch within an area, who deals with situations related to POA and EPOA transactions'.*

*'I'd like a dedicated or champion type of bank staff who I could have spoken to easily without having to wait for hours on the phone or at branches. This would apply to organisations such as Centrelink and Medicare.'*

*'...I asked the teller if I could speak to a 'senior person' at the bank and didn't really engage with the teller because I knew this wouldn't be very helpful, I thought it was beyond the teller's field of expertise. I was sat down in a private area and the person was very professional, you don't get any privacy with a teller.'*

*'...don't speak to the teller, tell them you want to speak with the supervisor, it's very difficult when you have lay people. Or make an appointment and come back...they're not trained to be helpful, banks in particular, they don't put themselves out for you. You have to be assertive with them.'*

*'More education and better communication by bank staff is needed.'*

*'Know the position of the person that you are dealing with at the bank. Don't presume that they are a professional, quite often they don't know what to do.'*

#### **Financial Institution (staff) recording process of POAs:**

Many participants reported that their POA was not 'lodged' or 'registered' at the branch where they first presented it, and therefore they had to provide it to staff each time they needed to do banking on behalf of the principal. Some participants had even reported being told by bank staff that their form could not be found or was 'lost'. It appears that better training is needed within banks, between branches and between phone staff and branches regarding EPAs and a centralised system for recording or registering POAs should be created.

*'...bank staff should be able to access documents like POA, EPA and Financial Management Orders at the click of a button. With the high technology environment we have today, this should be easy for banks to do. Their staff, whether at a branch or call centre, should be able to see on a computer system that a customer has provided these documents to them.'*

*'One day I was at the [X] branch depositing a large sum of money into a term deposit account in my mum's name, they asked me again for the EPA. I always carry a certified copy of it with me, so I gave it to them to sight and record on their system, but told them that a copy of the EPA should already be on their system. They searched for it on their computer system and eventually found it.'*

*'Recently, I had to sign something at the bank and I was told to bring the EPA to the bank again because call centres and branches did not speak to each other....they told me that branch staff could not access documents that were with the call centres.'*

*'I registered my brother's EPA with the bank, but the bank wouldn't accept the EPA as I only had a photocopy, the original was with the solicitor. I was asked to get the EPA certified every 3 months'.*

**At what stage did the participants 'lodge' their POA forms with a financial institution:**

In the majority of cases the POA form was only first taken to the bank (in person and often with the principal), when the attorney needed to act upon it (e.g.: make a bank transaction using their power of attorney). This often posed a problem, as acting upon the POA usually meant that something negative had occurred (such as the principal being diagnosed with dementia or had encountered a financial problem or crisis), creating an element of urgency and heightened emotion. As frontline staff were often unsure about POAs and what to do with them (as well as lacking knowledge about dementia and loss of capacity), this further exacerbated the situation for attorneys. Financial Institutions also often did not provide a private area in which to discuss the situation, which led to further difficulty in recognition of the POA.

There were a few cases where the attorney 'lodged' the POA with the financial institution before needing to act upon it. When this was done, there were far fewer issues with frontline staff (less emotional distress and conflict).

*'Act quickly, register the POA....don't do it when you're in a heightened emotional state, get it out of the way early, it's less emotional that way'.*

*'After all the initial problems setting it up, it has run very smooth, however this was a very time consuming and emotional experience'.*

*'The branches should have a separate space where they can speak with the customers privately. This is important as it a very emotional time for them'.*

*'The banks must offer more private areas for the elderly to discuss such issues so they can feel more secure'.*

*'Elderly people can be easily daunted and are used to taking the word of an authority figure'.*

*'I was not aware if my POA worked interstate, so we should all better prepared with all the relevant documents before approaching the different banks and their branches'.*

*'Number one, register the document first, two, ask to speak to a senior person and three bring the original document.'*

### **Pre-existing relationship between the attorney and the frontline staff:**

Some evidence showed that recognition of POAs was easier when the attorney is known to financial institution branch staff. However the fact that staff know or do not know an attorney and/or principal should not be a substitute for trust (reliance on the instrument), and the POA form proves that the attorney has been empowered by the principal to conduct their banking.

Being known to bank staff is likely to become less common in the future as these days it is more common for customers to use online or telephone banking, rather than go into the financial institution themselves.

*'It was only that the staff at the bank knew me and were therefore helpful, if it was another bank that didn't know me personally, I don't think they would have been as helpful with accepting cheques into my account in my husband's name.'*

*'The bank staff knew me, so when I went to them with the EPA from my sister they knew what to do and gave me access to her online banking and balances on her credit cards without any problems.'*

*'I had my own accounts with the bank, the branch staff had known me for the past 14 years, so it was relatively easy to set up the EPA for my uncle and aunts' accounts.'*

*'The local branch staff were very helpful and knew me, my parents normally banked at another branch but I took original and certified copies of the EPA to the branch that I use. They took copies and entered them into their computer system.'*

*'The bank organised the bond [for the nursing home] without a problem...I was known to the staff at the branch.'*

### **Phone Banking Staff:**

The research showed that the majority of phone banking staff were not very well trained in regards to POAs with some providing incorrect information to attorneys, and the process took too long.

*'When I was on the phone to the bank I eventually had to ask for the supervisor who was able to help me. The supervisor found my EPA on the system, but also told me that I did not need to use the EPA for general account information, it was only required when I changed something on the account. This was never mentioned before by the tellers or customer service representative.'*

*'This was very stressful, as a carer you are strapped for time, you don't even have half an hour most times.'*

### **Frontline staff's lack of knowledge of dementia:**

As mentioned, frontline bank staff appeared to have little knowledge of dementia and loss of mental capacity. This knowledge deficit often caused frustration and communication problems between the attorney and/or principal and staff. In some cases bank staff insisted that the attorney bring the principal to the bank before financial authority was given to the attorney; defeating the purpose of an EPA. This caused difficulty and frustration for the attorney, and in some cases the principal was unable to leave the house due to limited mental and/or physical capacity. It appears that bank staff have not been sufficiently trained (or not trained at all) in dealing with customers, or attorneys of customers with cognitive and related functional decline.

*'There must be better protocols within the banks so the people who suffer from dementia, even after losing capacity, can continue to do banking with supervision.'*

*'As a carer, day to day things are already so stressful, and anything related to banking becomes a traumatic experience and just adds to the stress.'*

*'My husband's early stage dementia was very stressful for both of us, especially when the call centre staff used to insist on talking to the primary credit card holder [her husband] even though I had told them that he has Alzheimer's.'*

*'...more training within the banking industry on dementia and POAs, at Bank X, my friend's brother who has dementia is given money when he goes into the bank, this is dangerous, although the bank calls the sister just to find out if it is okay.'*

### **5.1.5 Third Party Signatory forms**

In all cases attorneys were asked by the financial institution to complete extra forms (usually a third party signatory form, as well as online banking forms) in order to have their power of attorney authority approved by the financial institution. Many participants felt that these extra forms should not be required by financial institution if they have a certified copy of the EPA.

Completing extra forms was also time consuming and frustrating to the attorney. However, most importantly, this information appears to show that it makes no difference whether the attorney has an EPA or not. Their request for financial authority of the principal's money was authorised by the financial institution irrespective of whether they had the POA or not.

This practice, of using third party signatories, is potentially conducive to financial abuse as the bank does not check the capacity or understanding of the account holder in regards to their request, while an EPA does. It appears that financial institutions (perhaps due to the issues with POAs, previously mentioned in the *Introduction*) have circumvented the need for an EPA by using third party signatory forms, and in the process have eliminated any capacity checks of their customer to grant authority to someone else over their accounts. The customer is most certainly on the 'back-foot' in this situation as once a third party signatory form is completed and approved then any misuse of funds by the third party is the responsibility of the account holder.

*'When the EPA was drawn up I took it to the bank and they asked me to be a signatory on my mother's account. Since I had worked with a law firm and my husband was a lawyer, I told them that it was not a requirement to become a signatory if I had an EPA. The bank agreed but despite that they still wanted me to be one, it was their policy.'*

*'After the EPA was set up it became easy to withdraw money using my mum's ATM card, but I also had to become a third party signatory on my mum and dad's accounts.'*

*'...I found the bank's processes for recording POAs lengthy and there were lots of forms to fill out. The staff at the bank did not seem to be familiar with the whole process.'*

*'My mum was diagnosed with dementia and before the diagnosis I had gone to my mum's bank. One of the staff members knew my mum and told me that my mum was being forgetful. She suggested that I should think about becoming a signatory on her account, which would help my mum if she continued to get worse.....I took the bank teller's advice and took the form home and asked my mum to sign it, which enabled me to be a third party signatory to the account.'*

*'My experience with banks is improving, although I feel that they [bank staff] don't get formal training about these issues and should. Their understanding of the policy and meaning of the EPOA is not clear..... I realised this when the bank still ask me to fill in extra forms and need me to be a signatory on the account which is not the correct practice.'*

#### **5.1.6 Online banking and Powers of Attorney**

These days many people, though fewer older people, use online banking and many participants used online banking to perform their duty as attorney. In some cases, online banking conducted by the attorney was done 'officially' (the attorney was given their own online banking log in for the principal's bank account). In other cases, online banking was conducted 'unofficially' (the principal provided the attorney with their online banking log in and password) and in these situations, an EPA theoretically is not needed. This means that

an assessment of mental capacity of the account holder has not occurred, potentially opening the principal up to financial abuse.

*'When I went to the bank the teller suggested that I use online banking, telling me that it would make life easier. The teller sighted the EPA, recorded it on the bank's system and created a separate profile for me to be able to do online banking.'*

*'My experience with bank [X] became better after I had been set up with an internet banking profile. Through my own internet banking profile I can now access both my sister's and my aunt's accounts. The bank gave me a separate online access code for my accounts and a different access code for my mother's account.'*

*'Internet banking needs to be more stringent and accessible. The bank staff needs more consistent training regarding what is legal, there are a lot of grey areas within the law that does not necessarily relate to bank's policy and compliance as well'.*

#### **Online banking and joint EPAs:**

Online banking does not work well (or at all) for 'two-to-sign' or joint POAs. It is difficult, if not impossible at present to monitor and prove that both attorneys authorised an online banking transaction. This is a particular problem when attorneys are appointed to act jointly, as online banking will allow one attorney to make a transaction without the authority of the second attorney. Financial institutions must follow the principal's instructions in respect of how the attorneys are to make their decisions.

*'Protocols need to change within the banking industry and maybe the law because there seem to be many loopholes for the banks to overlook certain legal requirements in a POA. My mum's POA has both me and my brother's name on it, but since my brother does not want to be involved in mum's day to day transactions, I sign and action the transactions myself. The bank doesn't question me and maybe isn't even aware of it'. [in this case the attorneys were appointed jointly].*

*'I'm not sure about using joint attorneys, especially when dealing with the banks, it seems to be more complicated, maybe they should offer products that satisfy the protocol of using the instruments.'*

#### **5.1.7 Credit Cards and Powers of Attorney**

During the research a previously unidentified major issue emerged relating to substitute decision making and credit cards. Whilst financial institutions are willing to allow an attorney (when they sign a third party signatory) their right to make transactions from the principal's

bank account, the situation is quite different when it comes to allowing an attorney to manage the principal's credit card.

When dealing with credit cards and POA requests, the majority of banks appear to only partially grant the authority of the EPA. When dealing with credit cards and approving the POA, a financial institution will only make the attorney a secondary card holder. Financial institutions generally allow a 'primary' and 'secondary' credit card holder for its credit cards, and these two have different levels of authority. The 'primary user' has complete financial control over the credit card account, while the 'secondary user' has limited authority, such as being unable to change the credit card limit, close the account and speak to bank staff to obtain information about the credit card account.

*'My mum had a credit card which I was added as a secondary cardholder and I was issued with a separate card. Being the primary card owner my mum was authorised to make all major decisions but I could sort out other day to day issues as the secondary cardholder. But I was not allowed to make any changes on the card.'*

*'I was given a hard time about my aunt's credit card, they said that I couldn't get any information related to her credit card, which I knew was incorrect. They then asked me to get a form signed by my aunt, which would allow me to get this authority. I thought this was above what the bank needed as I had an EPA from my aunt.'*



## 5.2 Banks

We engaged the assistance of the Australian Bankers' Association (ABA) and the Customer Owned Banks Association (COBA) in recruiting its members for participation. The ABA agreed to assist in the research, while COBA did not. As a result, two of the four major banks (named *Bank P* and *Bank Q* for the purposes of anonymity) participated in in-depth interviews. The bank participants were senior managers who dealt with power of attorney policies and practices at their bank.

### 5.2.1 Power of Attorney Bank policies, recognition, checks and policies of Substitute Decision Making Instruments

Both banks stated that they had POA and Financial Management Orders (FMOs) policies in place, and they both conducted their own validity checks.

Bank P stated that their policies require frontline staff to review the POA document and ascertain its intended purpose; which can limit the authority of the attorney. Their staff are instructed to check the POA has been witnessed correctly, verify the identity of the attorney, check that the POA is 'still in force', and also require a 'Certificate of non-revocation'. The 'Certificate of non-revocation' is a form (created by Bank P) on which the attorney is required to declare that they are unaware of the POA being revoked or invalid. They also suggest to the principal that a third party signatory be set up as well as setting up online banking for the attorney. The form is then scanned into a database. Bank P stated that they review their POA policies on a 'regular basis.'

Bank P stated that in the absence of a national register, the onus of the document's legitimacy remains on the attorney or the principal. The bank assumes that the document presented to them has been created in accordance with the law or jurisdiction it was created in. It also assumes until proven otherwise that the attorney is acting in the best interest of the customer (the principal).

Bank Q stated that they do not require any forms to be completed, and that the staff deal with the POA on case to case basis. The process remains the same whether the customer (principal) or attorney presents the POA.

Bank Q's policies require frontline staff to conduct a verification check before accepting the POA. They also stated that their bank 'recognises General and Enduring POA on their face value and do not require the customer to complete Bank Q specific forms'.

Bank Q stated that the following checks are performed when a POA is presented to branch staff:

1. 'If it is the original document, the staff member takes a copy and certifies it. If it is a certified copy, [Bank Q] will only accept if it is certified by the principal, solicitor or Justice of the Peace. [Bank Q] will not accept a copy of a certified copy'.
2. 'The signature of the principal is verified, either by comparison with the customer's signature on their bank records, by contacting the principal to confirm the signing of the document, or if witnessed by a solicitor, contacting that solicitor to confirm the solicitor witnessed the customer's POA'.
3. 'Verification checks are conducted to ensure the power of attorney is dated, the principal's signature has been witnessed, and if it has a commencement or expiry date, ensure it is presented to the bank between those dates'.
4. 'The principal and attorney are identified in accordance with the bank's procedures. Operations on the account by the attorney are not permitted until the attorney has been satisfactorily identified'.

Bank Q stated that they also have specific checks for transactions made by the attorney (using the principal's account). These checks included:

- 'A request by the attorney to transfer funds from the principal's account and credit those monies to the attorney's account.'
- 'A request by the attorney to withdraw a large sum of money from this principal's bank account in cash.'
- 'A request by the attorney to issue a bank cheque in favour of the attorney by withdrawing funds from the principal's bank account'.

When a staff member identifies a transaction that is unusual they need to either:

- 'Contact the principal and seek confirmation'
- 'Ask the attorney to point out to the staff the provision of the power of attorney that authorises them to conduct the transaction in question.'
- 'Discuss with the attorney options (for example, if the transaction relates to outstanding account of the principal it may be possible to effect the payment for the principal by the attorney producing the invoice that clearly displays the account [sic] [that] relates to the principal and making payment by bank cheque)'.

Bank Q stated that the procedures also direct staff to their legal help team if they have any questions arising from a transaction requested by an attorney. Bank Q felt that the policies and procedures were working well at the branch level and reported that complaint levels relating to the acceptance of powers of attorney are low.

### **5.2.2 Where are POAs stored at banks?**

Both banks recognised that there are some technology constraints in having a centralised database to store all POA forms.

At Bank Q, branch staff file the POA and certified copies in a 'binder' at each individual branch. They also stated that 'their system' does not allow for 'third party signatories' and 'power of attorney' documents to be identified separately – customer accounts with either a POA or a third party signatory cannot be differentiated by the bank.

Bank P stated that they store the POAs on a database.

### **5.2.3 POAs from other states**

Both banks stated that their policies and procedures for POAs and FMOs are the same for POAs and FMOs from states other than NSW, as long as the document satisfies the requirements of the state it was created in.

### **5.2.4 Online banking**

In regards to online banking and call centres, both banks had similar policies and procedures. POAs cannot be set up over the phone or online as the attorneys need to be identified. To be identified, the attorney is required to go into a branch, and is then given a security code for online banking.

Bank Q stated that once the attorneys are in the bank's 'system', they can use online and phone banking on behalf of the principal.

Bank P stated that their online banking cannot allow for 'two to sign' or joint attorneys.

### **5.2.5 Difficulties at branch level**

Both banks acknowledged that their frontline staff experience difficulties from time to time when dealing with POAs and that there are occasions where the attorney has had problems while conducting their duties on behalf of the principal.

Bank Q stated that the difficulties were mainly due to POAs and FMOs not being 'very common', and therefore staff were unfamiliar and inexperienced in dealing with them, leading to a lack of confidence. Bank Q stated that these difficulties are also sometimes due to a lack of knowledge and education on the part of the attorney; such as if the attorney did not understand the limitation of the POA.

Bank Q verified that its legal help line has handled questions that have been escalated to them from branch staff relating to POAs, which they state may be due to either lack of awareness of the procedures that are available on the intranet or again, lack of confidence of staff in following those procedures. Bank Q is currently scheduled to issue its branch staff

with procedures they are required to follow in regards to substitute decision making instruments. Bank Q stated that having a legal help line for bank staff and improvements in training will likely lead to increased confidence levels of staff.

Bank Q stated that there are some 'bank system limitations', for example, if the attorney requests 'separate card access' to the principal's account, then their system will not allow this. In this case, 'Card access' is provided to the principal only.

Bank P felt that understanding the intended purpose of the POA and other such instruments through training will reduce difficulties at the branch level. At present the issues they face are determining:

- Whether the attorney has proper authority to act?
- The nature of the transaction. Namely, in ascertaining whether the transaction is within the scope of the attorneys authority and that there is not direct benefit to the attorney.
- Whether the attorney(s) can act severally or jointly?

Bank P states that these issues are resolved through front line staff liaising with support or legal staff and working together with the attorney. If the transaction is inconsistent with the authority on the POA document, then staff may suggest that the attorney seek independent legal advice.

Bank P stated that they are aware that at times the attorney becomes frustrated when branch staff query a large transaction, however, this is a standard procedure that the branch staff must follow. They therefore believe that further education on the responsibilities and duties of the attorney should be addressed.

Bank P attributed branch staff problems with POAs to the branch staff member being young or being a part-time employee, and stated that 'they were only human'. Bank P stated that a transaction that may be inconsistent with the customer (principal's) best interests could be dealt with differently by an untrained staff member and an experienced staff member and stated that this may be where the inconsistency of information provided to the attorney and/or principal may stem from.

Another issue raised by Bank P was their lack of recourse when there is suspicion of mismanaged funds by the attorney. Namely, Bank P reported that the NSW Police have not been helpful in such situations and that many states do not have a government body that the bank can approach regarding inappropriate financial conduct of an attorney, with

Queensland being the exception. Bank P believes that all Australian states should have a similar government body in place.

### **5.2.6 Training and Education of frontline staff**

Both banks do not have special targeted training on POAs, EPAs or FMOs, however information is available for staff to access freely on the bank's intranet. This is not mandatory and is not required to be done on a regular basis.

Bank Q has a legal system, which provides 'essential and advanced' training and FAQs regarding POAs for their frontline staff. The system is live, however has only recently been made available to frontline staff. Bank Q also has a second system for support via their intranet, and according to their data, there has been an increase in its usage by staff in the last six months.

Bank P stated that given that the use of POA documents have increased they feel that further training and development should be in place to ensure skill levels increasing along with the demand.

### **5.2.7 Information provided to customers regarding General and Enduring POAs**

No legal advice is provided by the banks to their customers however they encourage attorneys to approach the state bodies for further assistance. Bank Q stated that it may be beneficial for information to be made available for customers on their websites, however the information would be limited to their bank's policies and procedures.

Bank P suggests that industry needs to be made aware that banks are not a party to the POA, EPA and FMO. That is to say that the banks do not have a legal role to play, although they do have a 'Duty of Care'. They feel that customers and attorneys should know that on the appointment of an attorney, the attorney is granted certain rights to act in the best interest of the principal and they as banks are there to ensure that those interests are protected. Bank P also suggested that the attorneys should be made aware of their obligations.

### **5.2.8 POA information provided on banks websites**

We reviewed the websites of the major banks in NSW in regards to POAs and substitute decision making to complement the primary research that we conducted. It was found that the majority of banks have very basic information regarding POAs; advice and instructions provided to customers was limited. We found that some banks had information on POAs in regards to investment, superannuation and margin lending products. Information on the risks of lending and investments was provided on some bank websites.

It was found that third party signatory and co-signatory policies were very similar to that of POA policies and procedures. Third party signatory or co-signatory forms appeared to be encouraged more so than POAs with these forms being made available on the bank's websites for customers to complete and take to a bank branch.

One bank did provide POA guidelines for administrators and attorneys on their website. This was the only bank with extensive information on substitute decision making instruments.

### **5.2.9 Financial Management Orders**

Bank P stated that its FMO policy assumes the FMO to be true and valid until a notice has been issued about its non-existence to the bank. Adding to this, Bank P states that as FMOs are issued by a governing authority authenticity is assumed unless the bank is put on notice to the contrary.

Bank Q's FMO policy requires branch staff to send the FMO document to a specific team that deals with these issues. Bank Q however stated that anecdotal evidence showed that its branches tend to accept FMOs at face value without referring them to the specialised team, therefore senior management have decided to change their FMO policy to allow branches to deal with them in the same way as they deal with POAs.

## 5.3 Government Bodies

### 5.3.1 NSW Trustee and Guardian

The NSW Trustee and Guardian is the merged entity comprising the former Protective Commissioner and the Public Trustee. Their role “is to act as an independent and impartial Executor, Administrator, Attorney and Trustee for the people of NSW and provide direct financial management services and authorisation and direction to private financial managers.”<sup>14</sup>

The NSW Trustee and Guardian (NSWTG) have approximately 11,000 financially managed clients. In the last 10 years these figures have grown considerably, particularly in respect to the private clients. During the same period 16,160 POA were prepared for clients.

The total number of POA that have been created during this period can be broken down into 743 Active Assist matters (this is where the NSWTG actively manages the client’s affairs), 371 Funds Assist matters (where NSWTG only holds the funds on behalf of the client, and does not actively manage their affairs) and 100 conveyancing matters (where the NSWTG either sells or purchases realty on the client’s behalf, but does not actively manage their affairs).

Generally the NSWTG do not have problems in respect of financial institutions recognising them as the attorney. However, in one instance where a credit union refused to provide bank statements on request, the matter was resolved when sections 57 and 116 of the *NSW Trustee and Guardian Act 2009* were cited s57 (1) of the Act states that:

*For the purposes of its protective capacities in respect of a protected person or patient, the NSW Trustee has, and may exercise, all the functions the person or patient has and can exercise or would have and could exercise if under no incapacity.*

And s116 (1) states that:

*The NSW Trustee may, by notice in writing given to a person, order the person to furnish to the NSW Trustee such information or records (or both) as the NSW Trustee requires in connection with any matter relating to the responsibilities of the NSW Trustee when acting in a protective capacity.*

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<sup>14</sup> <https://www.tag.nsw.gov.au/about-us-2.html>

On another occasion NSW TG requested that a credit union place restrictions on withdrawals (to prevent exploitation of their client). Whilst the restriction was put in place it was only placed on the one branch and not communicated to other branches. The matter was resolved when NSW TG contacted the credit unions Head Office and requested that the limitations be noted for all branches.

Notwithstanding the above, the issue of recognition of both Financial Management Orders and POA, by financial institutions, in foreign jurisdictions, has proven to be problematic under the current arrangements.

### **5.3.2 Financial Ombudsman Service**

The role of the Financial Ombudsman Service is to resolve disputes between consumers and member financial services providers.<sup>15</sup>

With respect to the Ombudsman there was no breakdown in data available to show whether or not powers of attorney are recognised by financial institutions. Although there has been some anecdotal evidence where this has occurred, this information cannot be extrapolated from the information held by the Financial Ombudsman Service.

### **5.3.3 Guardianship Division of NCAT**

The Guardianship Division is a specialist disability division within NCAT (New South Wales Civil and Administrative Tribunal). The role of this Division is to “conduct hearings to determine applications about adults with a decision making disability who are incapable of making their own decisions and who may require a legally appointed substitute decision maker.”<sup>16</sup>

It would appear that generally appointees do not return to the Guardianship Division with issues associated with non-recognition of the Guardianship Order. There is some anecdotal evidence of confusion when the name on the Financial Management Order was not the identical name which appears on the account held at the financial institution, but as stated before, this is anecdotal.

When an individual is appointed as a private financial manager they are required to present audited books to the NSW Trustee and Guardian on an annual basis. Of great interest though is the fact that because of this requirement the private financial manager is then “covered” by the same legislation as the NSW Trustee and Guardian (*NSW Trustee and*

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<sup>15</sup> <http://www.fos.org.au/about-us/what-we-do/>

<sup>16</sup> <http://www.ncat.nsw.gov.au>



*Guardian Act 2009*) in respect of recognition (by third parties) of the Financial Management Order. This provision does not apply to attorneys pursuant to either a General or Enduring Power of Attorney.

#### **5.3.4 Land and Property Information (LPI)**

LPI is the Government Department responsible for “land title registration, property information, valuation surveying and mapping.”<sup>17</sup> It is also the department responsible for the Powers of Attorney legislation in NSW.

Pursuant to s 57 of the *Powers of Attorney Act 2003* (NSW) it is a requirement that a report be tabled in Parliament after 5 years of operation of the legislation. The report, which was tabled in 2010, concluded that although the Act was operating successfully there were some areas that could be improved upon. One of these areas was the prescribed form of power of attorney. The *Powers of Attorney Amendment Act 2013* saw the prescribed form of power of attorney split into two separate forms – General and Enduring.

Although there has been anecdotal evidence that some financial institutions do not recognise powers of attorney and have required the attorney to sign a specific authority document it remains anecdotal. As powers of attorney do not have to be registered unless the attorney is engaging in property matters these issues have not come to the attention of the LPI.

There are no further changes proposed to the powers of attorney legislation.

It was felt that education would be the preferable way to inform financial institutions about the recognition of powers of attorney. It was noted that financial institutions do recognise these instruments as is evident from the fact that mortgages are often signed on behalf of banks under a power of attorney, by their attorneys.

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<sup>17</sup> <http://www.lpi.nsw.gov.au/>

## 6 Conclusion

Whilst the number of consumer participants to the study was small it highlighted two of the major issues associated with powers of attorney, and that is we have no idea how many of these instruments are in existence nor if the documents presented are even the most recent. As mentioned in the Report there is no requirement to register these instruments unless the attorney wishes to engage in property dealings, so the number of powers of attorney in existence remains an estimate only.

The interviews with consumers demonstrated the need for wider community education associated with the appointment of attorneys and use of the instruments. The education should not be confined to consumers but should also include lawyers and the financial industry. It is understandable though that in the present situation of uncertainty surrounding the validity of the instruments that financial institutions do have another “layer” of forms to be completed, in the guise of “third party signatory/authorisation”. However, the problems associated with the use of these forms (from the consumer perspective) have been noted earlier in this Report.

The role of the Government agencies is crucial in addressing many of the issues surrounding the use (and/or abuse) of these instruments and any changes that could, and should, be implemented to improve the efficiency of the current tools used in substitute decision making.

The issues raised by consumers and the financial institutions demonstrate that there is a clear need for changes to the legislation surrounding powers of attorney and further research into the use of these instruments not only with financial institutions but with utilities such as organisations providing telecommunication services, gas and electricity and superannuation, to name but a few.

## **7 Recommendations**

### **7.1 Financial institution handling of substitute decision making policies**

- Financial institutions should make substitute decision making policies a priority; reviewing and evaluating these policies regularly, with the aim of implementing effective policies (for themselves and their customers).
- Financial institutions should ensure that their policies are 'fed-down', understood and used appropriately by frontline staff (tellers, phone staff and branch managers).

### **7.2 Financial institutions third party signatory and co-signatory policies**

- Production of a valid enduring power of attorney should be made mandatory when authorising third party signatories/co-signatories.

### **7.3 Education and training for frontline staff**

- Senior staff through to frontline staff should receive ongoing education about cognitive decline in particular, how to deal with customers who have a diagnosis of dementia, their attorneys and carers.

### **7.4 Educate customers and the general public**

- Financial institutions should become advocates for and encourage customers to have an enduring power of attorney, and
- Provide information on their website, and in their branches, on the importance of enduring powers of attorney.

### **7.5 Database**

- Financial institutions should have a centralised database in which to store customer powers of attorney, and accessible by the necessary staff (tellers, phone staff and branch managers).

### **7.6 National Register for Powers of Attorney**

- Financial institutions, consumers and relevant organisations should lobby the federal government for a national register of substitute decision making instruments.

## **7.7 Online banking**

- Tighter restrictions by financial institutions should apply to accessing a principal's account through online banking to help minimise the occurrence of financial abuse.
- Financial institutions should provide online banking options that allow for joint attorneys.

## **7.8 Implementation of the House of Representatives Inquiry Recommendations**

- All recommendations, as stated in the 2007 House of Representatives Standing Committee on Legal and Constitutional Affairs Report *Older people and the law*, are supported, in particular those relating to fraud and financial abuse and substitute decision making. It is envisaged that if the recommendations were implemented this would assist in providing greater security for both financial institutions and consumers in respect of recognition and implementation of substitute decision making instruments.

## **8 Substitute Decision Making Education Package (NSW)**

Based on the findings of the first stage of this research, an education package has been developed for banks, credit unions, and other identified organisations. The aim of this package is to assist those persons to understand the relevant instruments used in substitute decision making, in respect of financial transactions, and the associated issues affecting not only the attorney but the cognitive decline of the customer.

The education package has been reviewed and endorsed by the Australian Banker's Association.

With significant input from the Management of Change and Workforce Enabling Sub-Unit, of the CDPC, financial literacy packages for older consumers will also be updated. These new packages will be presented to financial institution peak bodies and branch managers throughout NSW, in preparation for a national rollout.

# Appendices

## **Expressions of Interest: Consumers for focus groups about Powers of Attorney**

We are looking for **expressions of interest** to recruit people who fit the following description:

- Consumers/people who, in the last ten years, (since the introduction of the *Powers of Attorney Act 2003* (NSW) have been **appointed 'attorney'** (either General or Enduring), or **'Financial Manager'** (under a Financial Management Order, appointed by the Guardianship Tribunal) and
- Have **acted in their role as attorney/ Financial Manager** (ie: have been required to move or withdraw money on behalf of the 'principal') through a financial institution (bank or credit union).

### **Brief description of the proposed project**

The project aims, by speaking to relevant consumers, to:

- Determine any issues experienced by those that have been appointed by someone (the 'principal') to be their 'attorney', through a Power of Attorney document (General or Enduring) or Financial Management Order (appointed as a Financial Manager by the Guardianship Tribunal).
- Determine how these issues could best be improved.

*For more information, please contact Lara Matkovic by email at [lara.matkovic@cotansw.com.au](mailto:lara.matkovic@cotansw.com.au) or by phone on 0414 405 355.*

## **Expression of Interest: Financial Institutions and frontline staff and senior managers for surveys and in-depth interviews**

We are looking for expressions of interest to recruit people who fit within the following description:

- Frontline Staff at a Financial Institution (bank or credit union)
- Senior Managers at Financial Institution (bank or credit union) who deal with the use of substitute decision making instruments such as Powers of Attorney (General and Enduring) and Financial Management Orders (appointed under a Courtship Tribunal).

### **Brief description of the proposed project**

The project aims to:

- Determine the policies and practices within financial institutions of substitute decision making instruments – Powers of Attorney (General and Enduring) and Financial Management Orders.
- Determine any issues experienced by frontline bank staff and Senior Management when dealing with people acting upon their role as ‘attorney’ (through a General or Enduring Power of Attorney or Financial Management Order), on behalf of a customer (i.e.: moving or withdrawing money on behalf of the ‘principal’).

### **Methodology**

This study includes both qualitative and quantitative methods for research, which includes:

- Online Questionnaires/Surveys (of frontline staff)
- In-Depth Interviews of Senior Managers involved in substitute decision making policies and procedures. Collected primarily in one on one, face-to-face interviews, and in some cases over the telephone.

*For more information, please contact Lara Matkovic by email at [lara.matkovic@cotansw.com.au](mailto:lara.matkovic@cotansw.com.au) or by phone on 0414 405 355.*



## Consumers Depth Interview Outline

### Criterion

Someone who, in the last ten years, has been appointed as an attorney (either enduring or general), or Financial Manager (appointed under a Courtship Tribunal), and has been required to act upon their role as attorney/ Financial Manager (ie: deal with) with a financial institution.

### Questions

1. Thinking about how you were first appointed attorney/financial manager for a family member/friend/acquaintance, can you please explain the circumstances or situation in which this happened? *(If you hold a power of attorney for more than one person, please answer for the situation in which you have been asked to act upon the agreement).*
2. What was involved in the process of being appointed? If you can please talk us through the steps you were required to take/took after being asked to be someone's attorney or financial manager.
3. Is the power of attorney /financial management order registered? *(This question possibly won't apply for those appointed Financial manager under a Courtship Tribunal).*
4. Do you know if you have been appointed through a general power or attorney or an enduring power of attorney? Do you know the difference between the two?
5. What are your responsibilities as attorney or financial manager?
6. Now, can you please explain or describe the circumstances in which you were required to act upon your capacity as attorney or financial manager with a financial institution.
7. What did the financial institution require you to provide as evidence as your attorneyship/financial management order?
8. Did you have any difficulties dealing with the financial institution when acting upon your role as attorney/financial manager? Did you achieve what you had set out to do? (i.e.: did the financial institution fulfil your request)?

- a. If your request was accepted (you achieved what you set out to do with the financial institution), please explain the steps you were required to take in order to have your request completed.
  - b. If you had difficulties with the financial institution how did you address or resolve the situation?
    - i. Was the situation resolved? If yes, how was it resolved? If it wasn't resolved, what did you do?
    - ii. If the request was rejected by the financial institution what was the reason they gave you?
    - iii. In your opinion, was the financial institution helpful? Did they explain the situation clearly to you?
9. Overall, how would you rate your experience/s with the financial institution in regards to your role as attorney/financial manager? (e.g.: Excellent, good, fair, poor). Why, please explain your answer.
10. Is there anything you think could improve the way in which financial institutions deal with attorneys or financial managers? What would have improved/made your experience better or easier with the financial institution?

## Financial Institutions Senior Staff Depth Interview Outline

*General information about the financial institution will be gathered prior to organising a depth interview with a Senior Staff member, therefore only a few questions will be asked about the financial institution in this interview.*

*Interview length: 1-1.5 hours*

### **About the Financial Institution:**

Q1. How many people approximately work at your financial institution nationwide?

### **Financial Institution's General and Enduring Powers of Attorney and Financial Management Orders Policies and Procedures:**

Q2a. Do you have **policies and procedures** in place at your financial institution for substitute decision making instruments such as:

1. General Powers of Attorney
2. Enduring Powers of Attorney
3. Financial Management Orders

Q2b. Please briefly explain these policies.

Q3. Do these policies and procedures **vary for call centres and online** banking/credit union departments? If so, how and why do they vary?

### **Recognition of General and Enduring Powers of Attorney at your financial institution:**

*The following questions are in regards to your financial institution's 'recognition' of General and Enduring Powers of Attorney and Financial Management Orders. By 'recognition' we mean processing a request by an 'attorney'/financial manager of one of your customers. For example, an 'attorney'/financial manager requesting to withdraw or move money from one account to another on behalf of the 'principal'.*

Q4a. Does your financial institution recognise General and/or Enduring Powers of Attorney/Financial Management Order documents on their own, or are your customers required to complete documents or **forms specific to your financial institution in order to lodge and use** these documents with your financial institution? If yes, why do you require your customers to complete these forms?

Q4b. If yes, **how are your customers made aware of this**? At what stage in the process of lodging their General and Enduring Powers of Attorney form are customers required to complete these forms?

Q5. Does your financial institution recognise General and Enduring Powers of Attorney that have **not been previously lodged by the 'principal'** (one of your customers) with your financial institution?

Q6. Does your financial institution recognise General and Enduring Powers of Attorney from states other than NSW? If not, how do you deal with a situation where an 'attorney' has a form from **a state** other than NSW and wants to fulfil their duties as 'attorney' on behalf of one of your customers?

Q7. Do you have a **database** or similar in which you keep/lodge customer's General and/or Enduring Power of Attorney forms or Financial Management Orders? How do you keep this database or similar updated to ensure that you have a customer's most recent General and/or Enduring Powers of Attorney/Financial Management documents? What security access measures do you have in place for these databases?

***Financial Institution's General and Enduring Powers of Attorney Frontline Staff training:***

*The following questions are in regards to your Frontline staff – by 'Frontline' Staff we mean staff that deal directly with your customers at the branch level.*

Q8. Do you provide **training** for your frontline staff, on policies and procedures for General and Enduring Powers of Attorney and Financial Management Orders? If yes, how often and how are they trained (face-to-face, online training, etc.)?

Q9. Do you have **documents or manuals** for staff outlining your Powers of Attorney/Financial Management Orders policies and procedures? If yes, how does/can your front line staff access these documents/manuals?

***Financial Institution's checks and balances when processing General and Enduring Powers of Attorney and Financial management Orders:***

Q10. What **checks and balances** are in place at you financial institution at branch level with regards to General and Enduring Powers of Attorney and Financial management Orders and Financial management Orders? In particular, how does your financial institution check at the branch level that the General and Enduring Powers of Attorney documents or Financial Management Orders are still valid and are the most recent document?

***How well the Financial Institution's General and Enduring Powers of Attorney and Financial management Orders policies and procedures work at the branch level:***

Q11. How do you feel your financial institution's General and Enduring Powers of Attorney and Financial Management Orders **policies and procedures are working at the branch/frontline level?** (eg: between customers and frontline staff).

Q12a. Do you know if your **staff have difficulties** when dealing with 'attorneys' and/or 'Financial Managers' attempting to fulfil their duty (eg: moving money from one account to another or withdrawing funds on behalf of the 'principal')? What kind of difficulties do they experience? Do you feel that your policies and procedures for General and Enduring Powers of Attorney and/or Financial Management Orders run smoothly at the branch level?

Why/Why not?

Q12b. If there are difficulties, how do you/does your financial institution resolve them?

***Difficulties that 'Attorney's' face when fulfilling their duties as 'attorney' on behalf of a customer/Overcoming difficulties and confusion:***

Q13a. There has been some anecdotal reports that some 'attorney's' experience **difficulties at financial institutions while fulfilling their duties as 'attorney'** (eg: making withdrawals and/or transferring money from one account to another). Are you aware of this? Do you know if this has occurred at your financial institution?

Q13b. What do you think are the main reason/s that these difficulties occur? What do you think could be done to improve the situation?

***Information financial institutions provide to their customers regarding General and Enduring Powers of Attorney:***

Q14. Does your financial institution provide information to its customers about General and Enduring Powers of Attorney in regards to its use as a substitute decision making tool? If yes, what information do you provide? How do you provide it (on your website, brochures, etc)?

Q15. Would it be **helpful to your financial institution to build customer awareness** related to substitute decision making tools/instruments such as General Powers of Attorney, Enduring Powers of Attorney and Financial Management Orders? If yes, how do you think your financial institution could do this?

Q16. Would it simplify matters for your financial institution if there was harmonisation between the states/territories in respect of substitute decision making instruments?

***Other comments:***

Q17. Do you have any further comments to make about General and/or Enduring Powers of Attorney or Financial Management Orders?

## Recruitment Flyer for Consumers



### **Focus groups about Powers of Attorney**

Researchers from the University of Western Sydney and the Council on the Ageing are looking to investigate any issues experienced with Power of Attorney documents or Financial Management Orders, and how these issues could be improved.

If you have been appointed 'attorney' or 'Financial Manager' and have had contact with a bank or credit union, you are invited to register your interest in attending a focus group discussion.

For more information, see the Expression of Interest or contact Lara Matkovic ([lara.matkovic@cotansw.com.au](mailto:lara.matkovic@cotansw.com.au); 0414 405 355).