

Australian Guardianship and Administration Council Elder Abuse National Projects

Enduring powers of attorney (financial) – options paper

Comparative tables – current laws

2018

Contents

Table 1:	Framework (will, preferences and rights / best interests).....	3
Table 2:	Definition of, and approach to assessing decision making capacity.....	8
Table 3:	Attorney eligibility.....	14
Table 4:	Multiple attorneys.....	17
Table 5:	Principles / duties and obligations of attorneys.....	20
Table 6:	Commencement.....	25
Table 7:	Witnessing requirements.....	27
Table 8:	Scope of powers.....	35
Table 9:	Gifts.....	43
Table 10:	Maintenance of dependents.....	47
Table 11:	Conflict transactions.....	50
Table 12:	Record keeping.....	54
Table 13:	Separation of attorney and principal's property.....	58
Table 14:	Revocation.....	59
Table 15:	Offences / penalties.....	64
Table 16:	Compensation.....	68
Table 17:	Tribunal powers.....	72

Table 1 - framework

ACT	NSW	NT	QLD
<p>General principles in Schedule 1 must be complied with to the maximum extent possible¹ – views and wishes followed 'to the greatest extent practicable'² but 'consistent with proper care and protection'.³</p> <p>If an individual's wishes or needs cannot be expressed, the person exercising power must try to work out, as far as is possible, from the individual's past actions, what the individual's wishes and needs would be if the individual could express them and take those wishes and needs into account.⁴</p>	<p>A power of attorney must always act in the best interests of the principal.⁵</p>	<p>Decision making principles includes:</p> <ul style="list-style-type: none"> - Give effect to any advance care statement - If no statement, must exercise authority in the way the decision maker reasonably believes the adult would have done in the circumstances (unless excused) - In determining this, must as far as possible seek the adult's current views and wishes about the matter and - Take into account the adult's current and previously stated views and wishes about the matter and - The decision maker's personal knowledge of the adult and their views and wishes about the matter 	<p>Schedule 1 Section 7</p> <p>To the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account.⁸</p> <p>The principles of substituted judgment must also be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person ... exercising a power under this act, or an enduring document, must take into account what the person ... considered would be the adult's views and wishes.⁹</p> <p>However, a person ... exercising a power under this act, or an enduring document, must do so in a way consistent with the adult's proper care and protection.¹⁰</p> <p><i>Guardianship and Administration and Other Legislation Amendment Bill 2018</i></p>

¹ Powers of Attorney Act 2006 (ACT) s 44.

² Ibid sch 1 s 1.6(3).

³ Ibid sch 1 s 1.6(5).

⁴ Ibid sch 1 s 1.6(4).

⁵ Powers of Attorney Act 2003 (NSW) sch 2 (and common law)

⁸ Powers of Attorney Act 1998 (Qld) sch 1 s 7(3)(b).

⁹ Ibid sch 1 s 7(4).

¹⁰ Ibid sch 1 s 7(5).

		<p>and matters generally and</p> <ul style="list-style-type: none"> - May, but is not required to consult other persons. - If exercising authority in the way the decision maker believes the adult would have done, the decision maker must exercise the authority in that way even if doing so may not be in the adult's best interests (but not if unlawful) - If unable to form reasonable belief, or is excused from exercising substituted judgement (under s23 – if impracticable, unlawful, unreasonable burden on another person, no reasonably possibility the adult intended the statement to apply in the circumstances, or so unreasonable that it is justifiable to override the adult's wishes) the decision maker must exercise authority in the way the decision maker reasonably believes is in the adult's best interests.⁶ <p>In determining what is in the adult's best interests, the decision maker must:</p> <ul style="list-style-type: none"> (a) take into account all relevant considerations; and (b) weigh up those considerations, giving each of them the weight that the decision maker reasonably believes is appropriate in the circumstances.⁷ 	<p>(Qld)</p> <p>The new Bill inserts new general principle 8 which requires, to the greatest extent practicable, a substitute decision maker to seek the adult's views, wishes and preferences.¹¹</p> <p>The Bill also requires substitute decision makers:</p> <ul style="list-style-type: none"> - to preserve, to the greatest extent practicable, the adult's right to make the adult's own decision and if possible, support the adult to make a decision.¹² - recognise and take into account any <i>views, wishes and preferences</i> expressed or demonstrated by the adult¹³ - if the adult's <i>views, wishes and preferences</i> can not be determined must use the principle of substituted judgement so that if, from the adult's <i>views, wishes and preferences</i>, expressed or demonstrated when the adult had capacity, it is reasonably practicable to work out what the adult's <i>views, wishes and preferences</i> would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's <i>views, wishes and preferences</i>.
--	--	---	---

⁶ Advance Personal Planning Act (NT) s 22 & 23.

⁷ Ibid s 22(6A).

		<p>Subsection (7) provides a non-exhaustive list of relevant considerations, for example,</p> <ul style="list-style-type: none"> (a) the protection of the adult from harm, neglect, abuse and exploitation; (b) the provision to the adult of appropriate care, including the taking of appropriate health care action; (ba) promoting the adult's happiness, enjoyment of life and wellbeing; (c) protection of the adult's freedom of decision and action; (d) the ability of the adult to be as independent as is practicable; (e) the ability of the adult to achieve his or her maximum physical, social, emotional and intellectual potential; (f) the ability of the adult to live in the general community and take part in community activities; (g) maintenance of the adult's right to be treated with dignity and respect; (h) the ability of the adult to maintain his or her preferred living environment and lifestyle; (i) maintenance or creation of a positive support network for the 	<p><i>preferences</i> would be.¹⁴</p>
--	--	---	--

¹¹ *Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)* cl 56.

¹² *Ibid* cl 56 (s6C(10)(2)).

¹³ *Ibid* cl 56 (s6C(10)(3)).

¹⁴ *Ibid* cl 56 (s6C(10)(4)).

		<p>adult;</p> <p>(j) protection of the adult's property and financial resources from loss, damage or misuse;</p> <p>(k) protection of the adult's right to confidentiality of information about him or her.</p>	
SA	TAS	VIC	WA
<p>The donee of an enduring power of attorney must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor (and if he fails to do so, shall be liable to compensate the donor for loss occasioned by the failure).¹⁵</p>	<p>The attorney must exercise powers to protect the interest of the donor. If this is not done, he or she is liable to compensate the donor for any loss.¹⁶</p> <p>In so far as doing so will not conflict with the attorney's duty under subsection (1) to protect the interests of the donor, an attorney must exercise his or her powers as far as is possible and reasonable in the circumstances-</p> <p>(a) in the best interest of the donor; and</p> <p>(b) in consultation with the donor and</p> <p>(c) taking into account –</p> <p>(i) the wishes of the donor, in so far as those wishes have been, or can be</p>	<p>If a person is exercising a power, carrying out a function or performing a duty under the Act for a principal under an enduring power of attorney who does not have decision making capacity in relation to one or more matters, the person—</p> <p>(a) must do so in a way that is as least restrictive of the principal's ability to decide and act as is possible in the circumstances; and</p> <p>(b) in doing so must ensure that, the principal is given practicable and appropriate support to enable the principal to participate in decisions affecting the principal as much as possible in the circumstances.</p> <p>If an attorney under an EPOA is making a decision about a matter on behalf of a principal who does not have decision</p>	<p>The donee of an enduring power of attorney shall exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, he is liable to the donor for any loss occasioned by the failure.¹⁹</p> <p>The <i>Guardianship and Administration Act 1990</i> does not specifically go into when an attorney needs to act on the instructions of the donor, but generally speaking, when the donor retains legal capacity, the attorney shall act on those instructions.</p>

¹⁵ *Power of Attorney and Agency Act 1984 (SA)* s 7.

¹⁶ *Powers of Attorney Act 2000 (Tas)* s 32(1).

¹⁹ *Guardianship and Administration Act 1990 (WA)* s 107(1).

	<p>ascertained; and</p> <p>(ii) what would be reasonably likely to be the wishes of the donor, if he or she were not subject to a mental incapacity.¹⁷</p>	<p>making capacity in relation to that matter, the attorney must –</p> <p>(c) give all practical and appropriate effect to the principal's wishes; and ..</p> <p>(d) encourage the principal to participate</p> <p>(e) act in a way that promotes the personal and social wellbeing of the principal¹⁸</p>	
--	---	---	--

¹⁷ Powers of Attorney Act 2000 (Tas) s 32(1A).

¹⁸ Powers of Attorney Act 2014 (Vic) s 21.

Table 2 – Definition of, and approach to assessing decision making capacity

ACT	NSW	NT	QLD
<p>Statutory test</p> <p>A person has decision-making capacity (DMC) if the person can make decisions in relation to the person's affairs and understands the nature and effect of the decisions.²⁰</p> <p>A person has impaired decision-making capacity if the person cannot make decisions in relation to the person's affairs and does not understand the nature and effect of the decisions the person makes in relation to the person's affairs. <i>Note – 1 A person is not taken to have impaired DMC only because of certain attributes or behaviours (see s91) Note 2 For the criteria to work out if a person understands the nature and effect of making an enduring POA, see s.17.</i></p> <p>Understanding the nature and effect of making a power of attorney includes understanding each of the following:</p> <p>(a) That the principal may ... state or</p>	<p>Common law test²³</p> <p>A person is incommunicate if:</p> <p>(a) The person suffers from any physical or mental incapacity (temporary or permanent) that makes the person unable:</p> <p>(i) to understand communications respecting the person's property or affairs; or</p> <p>(ii) to express the person's intentions respecting the person's property or affairs, or</p> <p>(b) The person is unable to receive communications respecting the person's property or affairs because the person cannot be located or contacted.²⁴</p>	<p>Statutory test - <i>Advance Personal Planning Act</i> (NT) s.6</p> <p>An adult has DMC for a matter if he or she has the capacity to:</p> <p>(a) understand and retain information about the matter; and</p> <p>(b) weight the information in order to make a decision about the matter; and</p> <p>(c) communicate that decision in some way.²⁵</p> <p>An adult does not have impaired DMC for a matter only because he or she:</p> <p>(a) has a disability, illness or other medical condition</p> <p>(b) engages in unconventional behaviour or other form of personal</p>	<p>Statutory test – <i>Powers of Attorney Act 1998</i> (Qld) s.41</p> <p>(1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney. <i>Note – However, under the general principles, an adult is presumed to have capacity – schedule 1, section 1</i></p> <p><i>Note: Clause 62 of the Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld) provides that a principal has capacity to make an enduring power of attorney only if the principal –</i></p> <p>(a) <i>is capable of making the enduring power of attorney freely and voluntarily; and</i></p> <p>(b) <i>understands the nature and</i></p>

²⁰ *Powers of Attorney Act 2006* (ACT) s 9.

²³ Presumption that an adult has the mental capacity to enter any legal transaction or make any legal document such as a power of attorney. If the consideration of mental capacity is relevant, see: *Gibbons v Wright* (1954) 91 CLR 423, 438. [1954] HCA 17[7] (the capacity to understand the nature of that transaction when it is explained); *Ranclaud v Cabban* NSW (1988) Conv R 55-385 (understand authorising someone to look after affairs and the sorts of things that the attorney could do without further reference to them); *Ghosn v Principle Focus Pty Ltd* [2008] VSC 574 [76] (the nature and extent of the assets to be managed, the decisions likely to be made on the donor's behalf and the ability of the attorney to carry out the tests involved)

²⁴ *Powers of Attorney Act 2003* (NSW) s 4.

²⁵ *Advance Personal Planning Act* (NT) s 6.

<p>limit the powers to be given ..</p> <p>(b) That the principal may ... instruct the attorney about the exercise of the power</p> <p>(c) When the power can be exercised</p> <p>(d) If power can be exercised, the attorney has full power to make decisions in relation to, and will have full control over, the matter subject to terms of information about exercising the power that are included in the POA</p> <p>(e) That the principal may revoke the POA at any time the principal is capable of making the power of attorney</p> <p>(f) That the power continues even if the principal becomes a person with impaired decision making capacity</p> <p>(g) That if the principal is not capable of revoking the POA, the principal cannot effectively oversee the use of the power.²¹ <i>Note – A person has DMC if the person can make decisions in relation to the person’s affairs and understands the nature and effect of the decisions (see s9(1))</i></p> <p><i>(This information and the definition of DMC is set out on page 13 of the form)</i></p> <p>s.91 Things that do not indicate impaired</p>		<p>expression</p> <p>(c) chooses a living environment or lifestyle with which other people do not agree</p> <p>(d) makes decisions with which other people do not agree</p> <p>(e) does not speak English to a particular standard or at all</p> <p>(f) does not have a particular level of literacy or education</p> <p>(g) engages in particular cultural or religious practices</p> <p>(h) does or does not express a particular religious, political or moral opinion</p> <p>(i) is of a particular sexual orientation or identity or expresses particular sexual preferences</p> <p>(j) takes or has taken or is or has been dependent on, alcohol or drugs (but the effect of alcohol or drugs may be taken into account in determining whether the adult has impaired DMC for the matter) or</p> <p>(k) engages or has engaged in illegal or immoral conduct.²⁶</p>	<p><i>effect of the enduring power of attorney.</i></p> <p>(2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters-</p> <p>(a) The principal may ... specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power</p> <p>(b) When the power begins</p> <p>(c) Once the power for a matter begins, the attorney has power to make, and will have full control over, the subject matter to terms or information about exercising the power included in the enduring power of attorney</p> <p>(d) The principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power</p> <p>(e) The power the principal has given continues even if the principal becomes a person who has impaired capacity</p> <p>(f) At any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the</p>
---	--	---	---

²¹ Powers of Attorney Act 2006 (ACT) s 17.

²⁶ Advance Personal Planning Act (NT) s 6(5).

<p>decision-making capacity</p> <p>For this Act, a person is not taken to have impaired DMC only because the person –</p> <p>(a) is eccentric; or</p> <p>(b) makes unwise decisions; or</p> <p>(c) does or does not express a particular political or religious opinion; or</p> <p>(d) has a particular sexual orientation or expresses a particular sexual preference; or</p> <p>(e) engages or has engaged in illegal or immoral conduct; or</p> <p>(f) takes or has taken drugs, including alcohol.</p> <p>(2) However, in deciding whether a person has impaired DMC, any effect of drug taking on the person may be taken into account.²²</p>			<p>use of the power. <i>Note – If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.</i> ²⁷</p> <p><i>Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)</i></p> <p>Clause 62 of the new Bill also requires that a principal has capacity only if the principal is capable of making the EPA freely and voluntarily.</p>
SA	TAS	VIC	WA
<p>Common law test</p> <p><i>Powers of Attorney and Agency Act 1984</i> refers to the “legal incapacity” of the donor.²⁸</p>	<p>Statutory test</p> <p>The donor must understand the nature and effect of the deed or the instrument.²⁹</p> <p>A donor is taken to understand the</p>	<p>Statutory test - Section 4 Meaning of decision making capacity</p> <p>...a person has capacity to make a decision as to a matter (decision making capacity) if the person is able to (1)</p>	<p>Common law test</p> <p>General law principles in <i>Gibbons v Wright</i> [1954] HCA 17;(1954) 91 CLR 423 (the mental capacity required by law in respect of any instrument is relative to the particular transaction which is being</p>

²² *Powers of Attorney Act 2006* (ACT) s 91.

²⁷ *Powers of Attorney Act 1998* (Qld) s 41.

²⁸ *Powers of Attorney and Agency Act 1984* (SA) s 6.

²⁹ *Powers of Attorney Act 2000* (Tas) s 30(2).

	<p>nature and effect of the deed or instrument if he or she understands the following matters –</p> <p>(a) that the donor may, in the EPOA, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power</p> <p>(b) when the power begins</p> <p>(c) that, once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the EPOA;</p> <p>(d) that the donor may revoke the EPOA at any time when he or she has the mental capacity to do so</p> <p>(e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity</p> <p>(f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.³⁰</p> <p>Subject to s.31(2B), the power may be unlimited or may be limited to specific acts and any limitations may relate to the</p>	<p>(a) understand the information relevant to the decision and the effect of the decision; and</p> <p>(b) retain the information to the extent necessary to make the decision; and</p> <p>(c) use or weight that information as part of the process of making the decision; and</p> <p>(d) communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.</p> <p>A person is presumed to have DMC unless there is evidence to the contrary.</p> <p>A person is taken to understand ... if .. understands an explanation of the information given ... in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means.</p> <p>In determining whether a person has DMC regard should be had to the following –</p> <p>(a) a person may have DMC for some matters and not others</p>	<p>effected by means of the instrument, and may be described as the capacity of a person to understand the nature of that transaction when it is explained to them. (<i>The Public Trustee (WA) v Brumar Nominees Pty Ltd</i> [2012] WASC 161 at [17]).³²</p> <p>A person who ... has full legal capacity may create an enduring power of attorney.³³</p> <p>Statutory Review – in the absence of examples of difficulties interpreting the term there does not seem to be utility in amending the Act to define the term 'legal capacity'.³⁴</p>
--	---	---	--

³⁰ Powers of Attorney Act 2000 (Tas) s 30(3).

	<p>mode in which, or the time and place at which the authority may be exercised.³¹</p>	<p>(b) if a person does not have DMC for a matter, it may be temporary and not permanent</p> <p>(c) it should not be assumed that a person does not have DMC for a matter on the basis of the person's appearance,</p> <p>(d) it should not be assumed that a person does not have DMC for a matter merely because the person makes a decisions that is, in the opinion of others, unwise;</p> <p>(e) a person has DMC for a matter if it is possible for the person to make a decision in the matter with practicable and appropriate support (see examples of support)</p> <p>Despite 4(d), the fact that a person has made or proposes to make a decision that has a high risk of being seriously injurious to the person's health or wellbeing may, in conjunction with other factors, be evidence that the person is unable to understand use or weigh information relevant to the decision or the effect of the decision.</p> <p>Section 5 Assessing capacity</p> <p>A person who is assessing whether a</p>	
--	---	--	--

³² Western Australian Department of Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*, (2015) 30.

<www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/.../tp-3697.pdf>

³³ *Guardianship and Administration Act 1990* (WA) s 104(1a).

³⁴ Western Australian Department of Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*, (2015) 31.

<www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/.../tp-3697.pdf>

³¹ *Powers of Attorney Act 2000* (Tas) s 21.

		<p>person has DMC, must take reasonable steps to conduct the assessment at a time and in an environment in which the person's DMC can be assessed most accurately.</p> <p>Section 23 - Capacity to make an EPOA – understanding the effect of the decision to make an EPOA includes understanding the following matters –</p> <ul style="list-style-type: none">(a) The principal may place conditions on the power given to the attorney and give instructions .. about the exercise of the power(b) When the POA commences(c) That once the POA is exercisable in relation to a matter, the attorney has the same powers the principal has, when the principal has DMC ... to do anything for which the power for that matter is given(d) That the principal make revoke the power (while have DMC for the matter)(e) That the POA continues even if the principal becomes a person who does not have DMC for a matter in the POA(f) That at any time when the principal does not have DMC in relation to revoking the POA, the principal is unable to effectively overs the use of the power.	
--	--	---	--

Table 3 - Eligibility to be an attorney

Jurisdiction	Legislation	Qualification of attorney	Restrictions on who can be an attorney
ACT	<i>Powers of Attorney Act 2006 (ACT)</i>	No prescribed general eligibility requirements beyond “a person”, but the following are eligible for appointment - The public trustee and guardian A trustee company under the <i>Trustee Companies Act 1947</i> ³⁵	For property matters, a person must not appoint - A corporation other than the public trustee and guardian or trustee company under the <i>Trustee Companies Act 1947</i> - A person who is bankrupt or personally insolvent. ³⁶
NSW	<i>Powers of Attorney Act (2003) (NSW)</i>	No prescribed eligibility requirements (an attorney is defined as a person to whom the power is given). ³⁷	The power will be revoked after appointment in case of a change in the attorney’s circumstances, including if the attorney becomes bankrupt or loses the physical or mental capacity to act as an attorney. ³⁸ Must be over 18 years ³⁹ .
NT	<i>Advance Personal Planning Act (NT)</i>	An individual who is at least 18yo (can appoint an individual who is under 18 years of age to become a decision maker when the individual turns 18 but the appointment has no effect until the individual turns 18). A licensed trustee company. The Public Trustee. The Public Guardian. ⁴⁰	No prescribed restrictions

³⁵ *Powers of Attorney Act 2006 (ACT)* s 14.

³⁶ *Ibid* s14.

³⁷ *Powers of Attorney Act 2003 (NSW)* s.3

³⁸ *Ibid* s 5.

³⁹ *Minors (Property and Contracts) Act 1970 (NSW)* s 10.

⁴⁰ *Advance Personal Planning Act (NT)* s 15.

QLD	<i>Powers of Attorney Act 1998 (Qld)</i>	<p>A person who is at least 18 years old.⁴¹</p> <p>The public trustee.⁴²</p> <p>A trustee company under the Trustee Companies Act 1968.⁴³</p> <p>The <i>Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)</i> also specified that the person must have capacity for the matter.⁴⁴</p>	<p>A person who is not:</p> <ul style="list-style-type: none"> - A paid carer, or health provider, for the principal - Not a service provider for a residential service where the principal is a resident and - For a financial matter – not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the Bankruptcy Act 1988 (Cth) or a similar law of a foreign jurisdiction⁴⁵ <p>The <i>Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)</i> makes the following changes to the existing eligibility requirements:</p> <ul style="list-style-type: none"> - the attorney must have capacity for the matter - extends the provision in relation to paid carer include “has not been within the previous 3 years” - the Public Trustee may only be appointed for financial matters.⁴⁶ <p>This is consistent with the current role and functions of the Public Trustee.</p>
SA	<i>Powers of Attorney and Agency Act 1984 (SA)</i>	No prescribed eligibility requirements	No prescribed restrictions
TAS	<i>Powers of Attorney Act</i>	No prescribed eligibility requirements, but there are restrictions on the conduct of attorneys, for example	No specific restrictions on who may be an attorney, but a power of attorney is revoked by the death, bankruptcy or insolvency of

⁴¹ *Powers of Attorney Act 1998 (Qld)* s 29(1)(a)(i).

⁴² *Ibid* s 29(1)(b).

⁴³ *Ibid* s 29(1)(c).

⁴⁴ *Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)* cl 57.

⁴⁵ *Powers of Attorney Act 1998 (Qld)* s29(1)(a)(ii), (iii) & (iv).

⁴⁶ *Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)* cl 57.

	2000 (Tas)	restrictions on conflict transactions.	the donor ⁴⁷ .
VIC	<i>Powers of Attorney Act 2014 (Vic)</i>	<p>An individual who is of or over 18 years of age.⁴⁸</p> <p>A person convicted or found guilty of an offence involving dishonesty <u>IF</u> disclosed to the principal and recorded in the EPOA.</p> <p>A trustee company (unless a proceeding for winding up has commenced).⁴⁹</p> <p>An attorney under an EPOA may be appointed as being the occupant of a position, however described, at the time the power of attorney is made or from time to time.⁵⁰</p> <p>[The Public Advocate in relation to an EPOA for personal matters (section 28(3)).]</p>	<p>A person who is not:</p> <ul style="list-style-type: none"> - insolvent under administration.⁵¹ - convicted or found guilty of an offence involving dishonesty (UNLESS disclosed to the principal and recorded in the EPOA).⁵² - a care worker, a health provider or an accommodation provider for the principal⁵³ <p>A trustee company against which a proceeding for winding up has commenced.⁵⁴</p>
WA	<i>Guardianship and Administration Act 1990 (WA)</i>	<p>18 years of age</p> <p>Has full legal capacity⁵⁵</p>	No specific reference, but obligation to report to the State Administrative Tribunal if the attorney becomes bankrupt. ⁵⁶

⁴⁷ *Powers of Attorney Act 2000 (Tas)* s 27(1).

⁴⁸ *Powers of Attorney Act 2014 (Vic)* s 28(1)(a).

⁴⁹ *Ibid* s 28(2).

⁵⁰ *Ibid* s 29.

⁵¹ *Ibid* s 28(1)(b).

⁵² *Ibid* s 28(1)(c).

⁵³ *Ibid* s 28(1)(d).

⁵⁴ *Ibid* s 28(2).

⁵⁵ *Guardianship and Administration Act 1990 (WA)* s 104C.

⁵⁶ *Ibid* s 107.

Table 4 - Multiple attorneys

ACT	NSW	NT	QLD
<p>A principal may authorise 2 or more attorneys to act</p> <p>(a) ... together or separately or in any combination</p> <p>(b) or by authorising different attorneys to act in different circumstances, on the happening of different events or in relation to different matters (can also appoint substitute attorneys)⁵⁷</p> <p>If 2 or more attorneys are authorised for a matter and the POA does not state how they are to share the power, the attorneys are authorised to exercise the power jointly.⁵⁸</p> <p><i>Effect of revocation on joint powers</i></p> <ul style="list-style-type: none"> - If the principal has impaired decision making capacity, and there is 1 remaining attorney in relation to the matter, the remaining attorney may exercise power - If there are 2 or more remaining, the remaining attorneys may exercise power in relation to the matter together.⁵⁹ 	<p>The principal can appoint more than one attorney.</p> <p>Attorneys can be appointed jointly and terminates if one vacates office, jointly and the appointment is not terminated if one vacates office, or jointly and severally.</p> <p>Default (form) – If no option is selected or the option chosen is unclear or inconsistent, I intend my attorneys to act jointly and severally</p> <p><i>Effect of termination</i></p> <p>If a POA appoints 2 or more persons as attorneys jointly, the POA is terminated if the office of one or more attorneys becomes vacant.</p> <p>If a POA appoints 2 or more persons as attorneys either jointly or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the POA in relation to the other attorneys.⁶⁰</p> <p>Can appoint substitute attorneys, same</p>	<p>A principal may appoint one decision maker, or 2 or more decision makers for a matter or matters.⁶¹</p> <p>If the adult appoints 2 or more decision makers for a matter, they may be appointed to exercise their authority jointly, severally or jointly and severally.⁶²</p> <p>If not specified, jointly.⁶³</p> <p>Can appoint alternate or substitute attorneys.</p>	<p>A principal may appoint 1 or more of the following –</p> <ul style="list-style-type: none"> (a) a single attorney for a matter or all matters (b) different attorneys for different matters (c) a person to act as an attorney for a matter or all matters in a circumstances stated in the enduring document (d) alternative attorneys for a matter or all matters so power is given to a particular attorney only in a circumstance stated in the enduring document (e) successive attorneys for a matter or all matters so power is given to a particular attorney only when power given to a previous attorney ends (f) joint or several, or joint and several, attorneys for a matter or all matters (g) 2 or more joint attorneys for a matter or all matters being a number less than the total number of attorneys for the matter or all matters <p>The <i>Guardianship and Administration</i></p>

⁵⁷ Powers of Attorney Act 2006 (ACT) s.25 – but note s.32(2), a power can be exercised if the principal has lost DMC and a condition has not been satisfied.

⁵⁸ Ibid s 26.

⁵⁹ Ibid s 67.

	options as for attorneys.		<p><i>and Other Legislation Amendment Bill 2018 (Qld)</i> provides that a principal may not appoint more than 4 joint attorneys for a matter.</p> <p><i>Effect of power ending – joint attorneys</i></p> <ul style="list-style-type: none"> - If there is 1 remaining attorney, the remaining attorney may exercise power for the matter - If there are 2 or more remaining attorneys, the remaining attorneys may exercise power for the matter and, if exercising power, must exercise power jointly.⁶⁴
SA	TAS	VIC	WA
The donor can appoint 1 or more donees to act jointly or jointly and severally. ⁶⁵	Form – can appoint 1 or more, can be appointed jointly or jointly and severally ⁶⁶	<p>May appoint more than one person as attorneys.⁶⁷</p> <p>If more than one, the principal must specify the matters for which each attorney is to act.</p> <p>The principal may appoint any of the attorneys to act –</p> <ul style="list-style-type: none"> - as joint attorneys or 	<p>Limit of 2 persons appointed, whether jointly or severally, and may include a substitute donee.⁷¹</p> <p>Recommendation 55 of the Department of the Attorney General, <i>Statutory Review of the Guardianship and Administration Act 1990</i>, November 2015- that the Guardianship and Administration Act 1990 continues to restrict the number of donees under an EPOA to two persons under Part 9 of the</p>

⁶⁰ *Powers of Attorney Act 2003* (NSW) s 46.

⁶¹ *Advance Personal Planning Act* (NT) s 17(2).

⁶² *Ibid* s 17(3).

⁶³ Northern Territory Form.

⁶⁴ *Powers of Attorney Act 1998* (Qld) s 59A.

⁶⁵ *Powers of Attorney Act 1998* (SA) s 5(3).

⁶⁶ *Powers of Attorney Act 2000* (Tas) Form 4.

⁶⁷ *Powers of Attorney Act 2014* (Vic) s 30(1).

⁷¹ *Guardianship and Administration Act 1990* (WA) s 102.

		<ul style="list-style-type: none"> - as several attorneys or - as joint and several attorneys or - as majority attorneys. <p>If not specified, the attorneys are taken to be appointed to act as joint attorneys.⁶⁸</p> <p>A principal may appoint a person as an alternative attorney – the provisions of the Act that apply to attorneys apply to alternative attorneys.⁶⁹</p> <p>Ending of an attorney’s power where more than one attorney has been appointed, whether to act jointly, jointly and severally or by majority, does not affect the ability to exercise that power of any remaining joint and several attorney or attorneys, unless the principal specified otherwise in the EPOA.⁷⁰</p>	Act.
--	--	--	------

⁶⁸ *Powers of Attorney Act 2014* (Vic) s 30(3).

⁶⁹ *Ibid* s 31.

⁷⁰ *Ibid* s 62.

Table 5 - Principles / duties and obligations of attorneys

ACT	NSW	NT	QLD
<p>The general principles set out in Schedule 1 must be complied with to the maximum extent possible by anyone exercising functions under the Act.⁷² These include-</p> <ul style="list-style-type: none"> - Access to family members and relatives - Human worth and dignity - Role as a member of society - Participation in community life - Quality of life - Participation in decision making (right to take part preserved to greatest extent possible, if wishes and needs cannot be expressed, what wishes and needs would be but in a way consistent with proper care and protection) - Individual taken to be able to make decisions - Maintenance of existing supportive relationships - Maintenance of environment and values 	<p>49 Attorney acting with knowledge of termination or suspension of power</p> <p>(1) An attorney under a power of attorney that is terminated must not do any act or thing under the power of attorney if the attorney knows of the termination at the time the attorney does the act or thing. Maximum penalty: 5 years imprisonment.</p> <p>(2) An attorney under a power of attorney must not do any act or thing under the power of attorney where the authority to do that act or thing has been suspended if the attorney knows of the suspension at the time the attorney does the act or thing. Maximum penalty: 5 years imprisonment.⁷⁵</p>	<p>Exercise of authority by decision maker – the decision maker must</p> <ul style="list-style-type: none"> - Act in accordance with the decision-making principles - Comply with any restrictions in the EPOA, any order of the Tribunal and this Act - Cooperate with any other agents for the represented adult to enable them all to properly exercise their authority and - Act honestly and with care skill and diligence - If appointed jointly, must exercise power unanimously⁷⁶ <p>Decision making principles⁷⁷</p> <ul style="list-style-type: none"> - Give effect to any advance care statement (unless the adult states not to or the decision maker is excused) - If not, exercise authority in the way the decision maker reasonably believes the adult would have done in the circumstances, unless excused from doing so 	<p>Schedule 1 of the <i>Powers of Attorney Act 1998</i> (Qld) provides a number of general principles –</p> <ul style="list-style-type: none"> - Presumption of capacity - Same human rights - Individual value - Valued role as member of society - Participation in community life - Encouragement of self-reliance - Maximum participation, minimal limitations and substituted judgment - Maintenance of existing supportive relationships - Maintenance of environment and values - Appropriate to circumstances - Confidentiality <p>Clause 56 of the <i>Guardianship and Administration and Other Legislation Amendment Bill 2018</i> (Qld) inserts general principles, including</p> <ul style="list-style-type: none"> - Presumption of capacity - Same human rights and

⁷² *Powers of Attorney Act 2006* (ACT) s 44.

⁷⁵ *Powers of Attorney Act 2016* (NSW) s 49.

⁷⁶ *Advance Personal Planning Act* (NT) s 21.

⁷⁷ *Ibid* s 22.

<p>- Confidentiality</p> <p>See also s.91 Things that do not indicate impaired decision-making capacity.</p> <p>Must keep accurate records and accounts of all dealings and transactions made under the power <u>while the principal has impaired decision-making capacity</u>.⁷³</p> <p>Must keep the attorney's property separate from the principal's property (Note Property includes money and financial assets) <u>while the principal has impaired decision-making capacity</u>.⁷⁴</p>		<ul style="list-style-type: none"> - Must seek the adult's current view and wishes, take into account current and previously stated views and wishes and the decision maker's knowledge of the adult and his or her views and wishes and may consult other person who have information relevant to determining what the adult would have done in the circumstances - Even if doing so might not be in the adult's best interests - If unable to form a reasonable belief about what the adult would have done, or is excused from exercising substituted judgment, the decision maker must exercise the decision maker's authority in the way that the decision maker reasonably believes is in the adult's best interests. - In determining what is in the adult's best interests, must take into account relevant considerations and weigh up those considerations, giving each of them the weight that the decision maker reasonably believes is appropriate in the circumstances. - List of relevant considerations provided 	<p>fundamental freedoms</p> <ul style="list-style-type: none"> - Empowering adult to exercise human rights and fundamental freedoms - Maintenance of adult's existing supportive relationships - Maintenance of adult's cultural and linguistic environment and values - Respect for privacy - Liberty and security - Maximising an adult's participation in decision-making - Performance of functions and exercise of powers (in a way that promotes and safeguards the adult's rights, interests and opportunities and in the way that is least restrictive of those things) - Structured decision making (recognise and preserve to the greatest extent practicable, the adult's right to make the decision, and if possible support the person to make the decision, must take into account any views, wishes and preferences, if that cannot be determined, use the principles of substituted judgment by working out what the persons views wishes and preferences would be, once have taken into account all these factors, can exercise the power)⁷⁸
---	--	---	---

⁷³ Powers of Attorney Act 2006 (ACT) s 47.

⁷⁴ Ibid s 48.

⁷⁸ Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld), cl 56.

SA	TAS	VIC	WA
<p>The donee must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, shall be liable to compensate the donor for loss occasioned by the failure.⁷⁹</p> <p>Keep and preserve accounts of dealing and transactions made in pursuance of the power⁸⁰</p>	<p>An attorney under an EOA, during any period of mental incapacity of the donor –</p> <p>(a) is taken to be a trustee of the <u>property and affairs</u> of the donor according to the tenor of the power; and</p> <p>(b) must exercise his or her powers as attorney to <u>protect the interests</u> of the donor-</p> <p>and if he or she fails to do so, is liable to compensate the donor for any loss occasioned by the failure.</p> <p>An attorney, in so far as doing so will not conflict with the attorney's duty under subsection (1) to <u>protect the interests of the donor</u>, must at all times exercise his or her powers under an EPOA as far as is possible and reasonable in the circumstances –</p> <p>(a) in the best interests of the donor;</p>	<p>Section 21 Principles to be applied by persons acting under the Act</p> <p>When exercising a power, carrying out a function or performing a duty under this Act for a principal under an EPOA who does not have DMC in relation to one or more matters, the person-</p> <p>(a) Must do so in a way that is as least restrictive of the principal's ability to decide and act as is possible in the circumstances</p> <p>(b) In doing so must ensure that, the principal is given practicable and appropriate support to enable the principal to participate in decisions affecting the principal as much as possible in the circumstances.</p> <p>If an attorney ... is making a decision about a matter on behalf of a principal who does not have DMC in relation to that matter, the attorney must –</p> <p>(a) Give all practicable and appropriate</p>	<p>Must exercise power with reasonable diligence to protect the interests of the donor, and if fail to do so, liable to the donor for any loss.⁸³</p> <p>Shall keep and preserve accurate records and accounts of all dealings and transactions made under the power.⁸⁴</p> <p>Make an application to the State Administrative Tribunal if no longer wish to act and the donor has lost capacity.⁸⁵</p> <p>Report bankruptcy to the State Administrative Tribunal.⁸⁶</p> <p>The Tribunal has held that an attorney under an EPOA also has the duties of a common law POA. This includes the duty not to prefer their own interests over the donor's interests (unless the donor has specified otherwise in the EPOA).⁸⁷</p>

⁷⁹ Powers of Attorney and Agency Act 1984 (SA) s 7.

⁸⁰ Ibid s 8.

⁸³ Guardianship and Administration Act 1990 (WA) s 107(1)(a).

⁸⁴ Ibid s 107(1)(b).

⁸⁵ Ibid s 107(1)(c) & s 109(1)(c) & (2)(a).

⁸⁶ Ibid s 107(1)(d).

⁸⁷ Western Australian Department of Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*, (2015) 30.

<www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/.../tp-3697.pdf>

	<p>and</p> <p>(b) in consultation with the donor; and</p> <p>(c) taking into account -</p> <p>(i) the wishes of the donor, in so far as those wishes have been, or can be, ascertained; and</p> <p>(ii) what would be reasonably likely to be the wishes of the donor, if he or she were not subject to a mental incapacity</p> <p>(1B) For the purposes of this section, an exercise of a power under an EPOA is not to be taken to constitute a failure to protect the interests of the donor, and is to be taken to be in the best interests of the donor if-</p> <p>(a) it is an exercise of a power that the donor would have been likely to make if he or she were not subject to a mental incapacity; or</p> <p>(b) the exercise of the power consists of providing for those persons who the donor would expect to provide for, if he or she were not subject to a mental incapacity.</p> <p>(2) An attorney is not competent to appoint another person to perform any functions or exercise any powers in his or her capacity as such. (However, see s.32A, substitution of The Public</p>	<p>effect to the principal's wishes; and</p> <p>(b) Take any steps that are reasonably available to encourage the principal to participate in decision making, even though the principal does not have DMC,</p> <p>(c) Act in a way that promotes the personal and social wellbeing of the principal , including by</p> <p>(i) recognising the inherent dignity of the principal and</p> <p>(ii) having regard to the principal's existing supportive relationship, religion, values and cultural and linguistic environment; and</p> <p>(iii) respecting the confidentiality of confidential information relating to the principal.</p> <p>An attorney exercising a power for the first time when the power commences for a matter because the principal does not have DMC for that matter, the attorney must take reasonable steps to give notice that the attorney is commencing to exercise the power to any person who, the EPOA states, should be so notified.⁸¹</p> <p>Duties of attorneys</p> <p>An attorney under an EPOA -</p> <p>(a) must act honestly, diligently and in</p>	
--	---	--	--

⁸¹ Powers of Attorney Act 2014 (Vic) s 40.

	<p>Trustee).</p> <p>(3) An attorney under an EPOA must keep any property of the donor (apart from property held by the attorney and donor as tenants in common or joint tenants) separate from property of the attorney (Penalty – fine not exceeding 50 penalty units).</p>	<p>good faith; and</p> <p>(b) must exercise reasonable skill and care; and</p> <p>(c) must not use the position for profit, unless permitted under s70; and</p> <p>(d) must avoid acting where there is or may be a conflict of interest unless authorised by the power, the principal or VCAT; and</p> <p>(e) must not disclose confidential information gained as the attorney under the power unless authorised by the power or by law;</p> <p>(f) must keep accurate records and accounts as required by s.66.</p> <p>Nothing in s.63 is to be taken to affect any duty an attorney has at common law.⁸²</p>	
--	--	---	--

⁸² Ibid s 63.

Table 6 - Commencement

ACT	NSW	NT	QLD
<p>Default – when made</p> <p>A principal may state in a POA when, and how, power under the power of attorney is exercisable.</p> <p>However, if the power of attorney does not state when the power is exercisable, the power can be exercised once the POA is made.⁸⁸</p> <p>Form – the power can start immediately, ‘only when I become a person with impaired decision making capacity’ or from a specified date or event.⁸⁹</p>	<p>Default – when made</p> <p>General Power of Attorney Form</p> <p>Clause 4 Commencement</p> <p>This power of attorney operations (tick one):</p> <ul style="list-style-type: none"> - Immediately - On and from [insert date] up to and including [insert date] - Whilst I am overseas - Other <p>If no option selected, or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate immediately.</p>	<p>An advance personal plan comes into force when it is made.⁹⁰</p> <p>However, the decision maker may only exercise the authority to do anything in relation to the matter that the represented adult could lawfully do if he or she had full legal capacity, when the represented adult has impaired decision-making capacity for the matter.⁹¹</p>	<p>Default – when made</p> <p>Form – the principal may specify that an attorney’s power for financial matters commence: immediately, at a specific time, in a specific circumstance or on a date or on an occasion.⁹²</p> <p>If the clause is not completed, the power begins immediately.⁹³</p> <p>Note: under s114 of the <i>Powers of Attorney Act 1998</i>, an enduring document which is declared invalid, is void from the start.</p>
SA	TAS	VIC	WA
<p>No express default provisions</p> <p>The donor can elect that the power</p>	<p>No express default provisions</p>	<p>Default – when made</p> <p>A principal may specify a time from which, a circumstance in which or an</p>	<p>No express default provisions</p> <p>Options are that the power of attorney</p>

⁸⁸ *Powers of Attorney Act 2006* (ACT) s 16.

⁸⁹ *Ibid* s 96 (approved form).

⁹⁰ *Advance Personal Planning Act* (NT) s 11.

⁹¹ *Ibid* s 20.

⁹² *Powers of Attorney Act 1998* (Qld) s 33(1).

⁹³ *Ibid* s 33(2).

<p>becomes effective either:</p> <ul style="list-style-type: none"> - Upon the execution of the deed or - Only in the event of the donor suffering any subsequent legal incapacity⁹⁴ 		<p>occasion on which the power for all matters or the power for a specified matter ... is exercisable, which may be –</p> <ul style="list-style-type: none"> (a) immediately on the making of the power; or (b) when the principal ceases to have DMC for the matter(s); or (c) any other time, circumstance or occasion. <p>If not specified, the EPOA is exercisable on and from the making of the EPOA.</p> <p>Despite specification, if principal does not have DMC for a matter, an attorney for that matter may exercise that power during any period when the principal does not have that capacity.</p> <p>A person dealing with the attorney may ask for evidence of lack of DMC for the matter if powers commences when the principal does not have DMC.⁹⁵</p> <p>An attorney exercising a power for the first time when the power commences for a matter because the principal does not have DMC for that matter, the attorney must take reasonable steps to give notice that the attorney is commencing to exercise the power to any person who, the EPOA states, should be so notified.⁹⁶</p>	<p>(a) will continue in force notwithstanding the donor's subsequent legal incapacity; OR</p> <p>will be in force ONLY during any period when a declaration is made by the State Administrative Tribunal that the donor does not have legal capacity and that the power of attorney is in force under section 106 of the <i>Guardianship and Administration Act 1990 (WA)</i>⁹⁷</p>
---	--	--	--

⁹⁴ See *Power of Attorney and Agency Act 1984 (SA)* section 6(1) and Schedule 2 (Form of acceptance of enduring power of attorney).

⁹⁵ *Powers of Attorney Act 2014 (Vic)* s 39.

⁹⁶ *Ibid* s 40.

⁹⁷ *Guardianship and Administration Act 1990 (WA)* s 104(1) and s106.

Table 7 - Witnessing requirements⁹⁸

Jurisdiction	Legislation	No.	Qualification of witnesses	Restrictions	What witnesses are certifying
ACT	<i>Powers of Attorney Act 2006 (ACT)</i>	2 ⁹⁹	One witness must be a person authorised to witness the signing of a statutory declaration ¹⁰⁰ See Schedule 2, <i>Statutory Declarations Regulations 1993 (Cth)</i> for a list of occupations and other persons who are authorised to witness the signing of a statutory declaration. ¹⁰¹	A person signing the POA for the principal ¹⁰² A person appointed as attorney under the POA ¹⁰³ A child ¹⁰⁴ Only 1 of the witnesses can be a relative of the principal or attorney ¹⁰⁵	The POA must include a certificate signed by each witness stating that:- (a) The principal signed the POA voluntarily in the presence of the witness; and (b) At the time ... the principal appeared to...”understand the nature and effect of making the POA” ¹⁰⁶ – in the absence of evidence proving such a lack of understanding of this, the principal is taken to understand it. ¹⁰⁷
NSW	<i>Powers of Attorney Act 2003 (NSW)</i>	1 ¹⁰⁸	A “prescribed witness” means (a) a registrar of the Local Court, (b) a barrister or	Not an attorney under the power of attorney. ¹¹⁰	There is endorsed on, or annexed to, the instrument a certificate stating that: (i) the person explained the effect of the instrument to

⁹⁸ Does not include provisions relating to a person signing at the direction of the donor, or witness requirement for acceptance by the attorney – only Victoria requires a person over 18 to witness the attorney signing the acceptance (*Powers of Attorney Act 2014 (Vic)* s 37.)

⁹⁹ *Powers of Attorney Act (ACT)* s 19(2).

¹⁰⁰ *Ibid* s 21(3).

¹⁰¹ *Statutory Declarations Regulations 1993 (Cth)*, s 4 and sch 2.

¹⁰² *Powers of Attorney Act (ACT)* s 21(1).

¹⁰³ *Ibid* s 21(1).

¹⁰⁴ *Ibid* s 21(1).

¹⁰⁵ *Ibid* s 21(2).

¹⁰⁶ See section 17 Understanding nature and effect of making powers of attorney. However, in the absence of evidence to the contrary, the principal is taken to understand the nature and effect of making the power of attorney – see section 18.

¹⁰⁷ *Powers of Attorney Act (ACT)* s 22(1).

¹⁰⁸ *Powers of Attorney Act 2003 (NSW)* s 19(b).

			solicitor of a court, (c) a licenced conveyancer, certain employees of the NSW Trustee and Guardian or a trustee company or (d) qualified overseas lawyers independent of any legal practitioners appointed as attorney under the instrument or (c) as prescribed by the regulations. ¹⁰⁹		<p>the principal before it was signed; and</p> <p>(ii) the principal appeared to understand the effect of the power of attorney; and</p> <p>(iii) the person is a prescribed witness; and</p> <p>(iv) the person is not an attorney under the power of attorney; and</p> <p>(v) the person witnessed the signing of the power of attorney by the principal.¹¹¹</p>
NT	<p><i>Powers of Attorney Act 1983</i> (NT)¹¹²</p> <p><i>Advance Personal Planning Act 2014</i> (NT) (from 17/3/14)</p>	<p>1</p> <p>(or</p> <p>2)¹¹³</p>	<p><i>Advance Personal Planning Act</i></p> <p>An advance personal plan must be signed in the presence of an authorised witness¹¹⁴</p> <ul style="list-style-type: none"> - a person authorised under the <i>Oaths, Affidavits and Declarations Act</i> to administer an oath – s.7(1)(c)- in NT - a justice of the peace, a commissioner for oaths (s.23 – a member of the Legislative Assembly, a 	N/A	<p><i>Advance Personal Planning Act</i></p> <p>The witness must certify in the advance personal plan that:</p> <p>(a) the witness reasonably believes that the adult making the plan: (i) is who he or she purports to be; (ii) is 18 yo+ and</p> <p>(b) it appears to the witness that (i) the adult understands the nature and effect of the ...plan and (ii) the adult is acting voluntarily without coercion or other undue influence; and</p> <p>(c) the plan was signed (i) by the adult in accordance with ss(1); and (ii) in the presence of the witness¹¹⁶</p>

¹¹⁰ Ibid s 19(1).

¹⁰⁹ Ibid s 19(2).

¹¹¹ Ibid s 19(1).

¹¹² *Powers of Attorney Act 1983* (NT) deals with powers of attorney except enduring powers of attorney made after 17 March 2014 which, as an “advance personal plan” must be made under the *Advance Personal Planning Act 2014* (NT).

¹¹³ Unless the instrument is signed by direction of, and in the presence of the donor, in which case another person must also witness execution (*Powers of Attorney Act 1983* (NT) s 6(4)(b).)

¹¹⁴ *Advance Personal Planning Act 2013* (NT) s 10(2)&(5)(a)&(b).

¹¹⁶ Ibid s 10(3).

		<p>members of the Cth Senate who represents the Territory, a member of the Cth House of Reps who represents the Territory, legal practitioner, police officer, person appointed by Minister, or any person authorised by an Act; or</p> <ul style="list-style-type: none"> - a person prescribed by regulation to be an authorised witness – regulation 3 <i>APP Regulations</i> includes an accountant, the CEO of a local government council, health practitioner, social worker, the principal of a NT school. <p><i>Powers of Attorney Act</i></p> <p>An instrument creating a power must be executed in the presence of and attested by a person mentioned in Schedule 2 (in the Territory, a commissioner for oaths, members of the Legislative Assembly, legal practitioner, person holding office under the <i>Supreme Court Act</i>, <i>Justices of the Peace Act</i>, <i>Local Court Act</i> or <i>Registration Act</i>, a police</p>		<p><i>Powers of Attorney Act</i></p> <p>The instrument must be attested by the witness.¹¹⁷</p>
--	--	--	--	---

			officer, ..conveyancing agent.., a Notary Public. ¹¹⁵		
QLD	<i>Powers of Attorney Act 1998 (Qld)</i>	1 ¹¹⁸	<p>An enduring document must be signed and dated by an eligible witness – <i>Note – See section 31 (Meaning of eligible witness). It is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood the necessary matters. For a power of attorney – see section 41 ...)</i>¹¹⁹</p> <p>An eligible witness is a justice of the peace, commissioner for declarations, notary public or lawyer.¹²⁰</p>	<p>An eligible witness is not:</p> <ul style="list-style-type: none"> - the person signing the document for the principal - an attorney of the principal (under the document or otherwise) - a relation of the principal or a relation of an attorney of the principal.¹²¹ <p>relation, of a person, means—</p> <ul style="list-style-type: none"> (a) a spouse of the first person; or (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; or <p><i>Example of legal arrangement—</i></p> <ul style="list-style-type: none"> 1 <i>court order for custody</i> 2 <i>trust arrangement between trustee and beneficiary</i> (c) a person on whom the first 	<p>If an enduring document is signed by the principal, it must include a certificate signed by the witness stating the principal –</p> <ul style="list-style-type: none"> (a) signed the enduring document in the witness’s presence; and (b) at the time, appeared to the witness to have the capacity necessary to make the enduring document.¹²³

¹¹⁷ Ibid s 6(4).

¹¹⁵ Ibid s 6(4)(a).

¹¹⁸ *Powers of Attorney Act 1998 (Qld)* s 44(3)(b).

¹¹⁹ Ibid s 44(3)(b).

¹²⁰ Ibid s 31(1)(a) & s 44(3)(b).

¹²¹ Ibid s 31(b), (c) & (d).

¹²³ Ibid s 44(4).

				<p>person is completely or mainly dependent; or</p> <p>(d) a person who is completely or mainly dependent on the first person; or</p> <p>(e) a person who is a member of the same household as the first person.¹²²</p>	
SA	<i>Powers of Attorney and Agency Act 1984 (SA)</i>	1 + ¹²⁴	<p>One or more witnesses, at least one of whom is authorised by law to take affidavits.¹²⁵</p> <p>Includes a justice of the peace¹²⁶ a proclaimed member of the police force¹²⁷; a Commissioner for taking Affidavits (proclaimed members of the police force, certain judicial officers, certain court registrars and deputy registrars, and legal practitioners)¹²⁸</p>	N/A	Nil
TAS	<i>Powers of Attorney Act 2000 (Tas)</i>	2 ¹²⁹	<p>No special qualifications or experience required.</p> <p>A power of attorney must ... be signed by the donor with</p>	<p>Neither witness can be:</p> <ul style="list-style-type: none"> - a party to the enduring power of attorney, or 	<p>A declaration by each witness that he or she:</p> <ul style="list-style-type: none"> - witnessed the donor sign in their presence¹³²

¹²² *Ibid sch 3.*

¹²⁴ *Powers of Attorney and Agency Act 1984 (SA) s6(2)(a).*

¹²⁵ *Ibid.*

¹²⁶ *Evidence (Affidavits) Act 1928 (SA) s 2.*

¹²⁷ *Ibid s 2A.*

¹²⁸ *Oaths Act 1936 (SA) s 28.*

¹²⁹ *Powers of Attorney Act 2000 (Tas) s 9(1)(b)(i).*

			that signature attested by the signature of ... 2 witnesses neither of whom is a party to it nor a close relative of a party to it and each of whom has witnessed it in the presence of the donor and each other. ¹³⁰	- a close relative. ¹³¹ Penalty – fine not exceeding 2 penalty units.	- is neither a party to the enduring power of attorney - nor a close relative of a party to it. ¹³³
VIC	<i>Powers of Attorney Act 2014 (Vic)</i>	2 ¹³⁴	An instrument creating an enduring power of attorney must be executed – (a) by the principal (or person at direction) and (b) by 2 persons who are present and (i) who witness the signing of the instrument (ii) who sign and date the instrument in the presence of the principal and in the presence of each other; and (iii) who certify in writing in the instrument in the	The following persons are not eligible to witness the signing of the instrument: A person signing the instrument at the direction of the principal. An attorney under the power of attorney. A relative of the principal. A relative of an attorney under the power of attorney. A care worker or an accommodation provider for the principal. ¹³⁹	A witness must certify in writing in the instrument – - that the principal appeared to freely and voluntarily sign the instrument in the presence of the witness and - that at the time the principal signed the instrument, the principal appeared to the witness to have decision making capacity in relation to the making of the enduring power of attorney state that the witness is not – - an attorney under the power of attorney - a relative of the principal or of an attorney under the power of attorney - a care worker or an accommodation provider for the principal. If the witness is acting as a person who is authorised to

¹³² Ibid sch 1 – Forms.

¹³⁰ Ibid s 9(1)(b)(i).

¹³¹ Ibid s 9(1)(b)(i).

¹³³ Ibid s 9(1)(ba).

¹³⁴ *Powers of Attorney Act 2014 (Vic)* s 33(b).

		<p>manner required by section 36.¹³⁵</p> <p>The two persons who witness the signing of the instrument creating an enduring power of attorney must be 18 years or older.¹³⁶</p> <p>One person must be either authorised to witness affidavits (certain judicial officers, MPs, public notary, legal practitioner, patent attorney, certain police officers, public sector employees and Council officers¹³⁷) or a medical practitioner.¹³⁸</p> <p>(However, the <i>Oaths and Affirmations Act 2018</i> (Vic) will commence on 1 March 2019, replacing the provisions of the <i>Evidence (Miscellaneous Provisions) Act 1958</i> (Vic) in relation to persons who are authorised affidavit takers).</p> <p>See sections 46, 48 & 49 for execution and witnessing instruments of revocation.</p>	<p>witness affidavits or a medical practitioner, state the qualification on which the witness is acting.¹⁴⁰</p>
--	--	---	--

¹³⁹ Ibid s 35(2).

¹³⁵ Ibid s 33.

¹³⁶ Ibid s 35(1)&(2).

¹³⁷ *Evidence (Miscellaneous Provisions) Act 1958* s 123C.

¹³⁸ *Powers of Attorney Act 2014* (Vic) s 35(1)(b).

¹⁴⁰ Ibid s 36(1).

WA	<p><i>Guardianship & Administration Act 1990 (WA)</i></p> <p><i>Oaths, Affidavits and Statutory Declarations Act 2005 (WA)</i></p>	<p>2¹⁴¹ An instrument is not effective to create an enduring power of attorney unless there are 2 attesting witnesses to the instrument –</p> <p>(a) both of whom are authorised by law to take declarations; or</p> <p>(b) one is authorised by law to take declarations¹⁴² and the other is 18yo+ and is not a person appointed to be a donee or substitute donee of the power.¹⁴³</p> <p>A non-authorized witness must be 18yo+ and must not be appointed to be a donee or substitute donee of the power.¹⁴⁴</p>	<p>The non-authorized witness must not be</p> <ul style="list-style-type: none"> - under 18 years of age - appointed to be a donee or substitute donee of the power.¹⁴⁵ <p>Recommendation 57 Statutory Review – the Act is amended so the witness referred to in s104(2)(a)(ii)(l) (the authorised witness) must be a person who is not a person appointed to be a donee or substitute donee of the EPOA other than a staff member of the Public Trustee or a trustee company that is the donee.¹⁴⁶</p>	Nil
----	--	---	--	-----

¹⁴¹ Guardianship and Administration Act 1990 (WA) s 104(2)(a).

¹⁴² *Oaths, Affidavits and Statutory Declarations Act 2005 (WA)* s.12(6)(a) Schedule 2 – includes tertiary academics, accountants, architects, consular and diplomatic officers, bailiffs, bank managers, chartered secretaries, governance advisers or risk managers, chemists, chiropractors, company auditors or liquidators, court officers, defence force officers, dentists, doctors, electorate officers, engineers, industrial organisation secretaries, insurance brokers, justices of the peace, Landgate officers, lawyers, local government CEOs or deputy CEOs and councillors, loss adjusters, marriage celebrants, MPs, ministers of religion, nurses, optometrists, patent attorneys, physiotherapists, podiatrists, police officers, post office managers, psychologists. Public notaries, public servants, real estate agents, settlement agents, sheriffs or deputy sheriffs, surveyors, teachers, tribunal officers, veterinary surgeons and anyone authorised under the *Commonwealth Statutory Declarations Act 1959* to take a statutory declaration.

¹⁴³ *Guardianship and Administration Act 1990 (WA)* s 104(2) and s 104(3).

¹⁴⁴ *Ibid* s 104(3).

¹⁴⁵ *Ibid* s 104(3).

¹⁴⁶ Western Australian Department of Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*, (2015) 30.

<www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/.../tp-3697.pdf>

Table 8 - Scope of powers

Jurisdiction	Legislation	Scope of authority	Excluded matters
ACT	<i>Powers of Attorney Act 2006</i> (NT)	<p>An adult may, by a POA, appoint 1 or more people to do <u>anything for the principal that the principal can lawfully do by an attorney</u>.¹⁴⁷</p> <p>Maintain principal's dependants (reasonable).¹⁴⁸</p> <p>A principal may state in a power of attorney when, and how, power under the power of attorney is exercisable.¹⁴⁹</p>	<p>Unless expressly authorised –</p> <ul style="list-style-type: none"> - Authorise anyone else to exercise the power¹⁵⁰ - Benefit attorney(s)¹⁵¹ - Make a gift¹⁵² - Provide for reasonable living expenses of a nominated person¹⁵³ - Conflict transactions¹⁵⁴ <p>Can never exercise power in relation to 'special personal matters' and 'special health care matters'.¹⁵⁵</p>
NSW	<i>Powers of Attorney Act 2003</i> (NSW)	<p>(1) A prescribed power of attorney confers on the attorney the authority to do on behalf of the principal <u>anything that the principal may lawfully authorise an attorney to do</u>.</p> <p>(2) A prescribed POA has effect subject to compliance with any conditions or limitations specified in the instrument creating the power¹⁵⁶</p>	<p>Unless expressly authorised –</p> <ul style="list-style-type: none"> - Appoint a substitute, delegate or sub-attorney¹⁵⁷ - Give gifts¹⁵⁸ - Confer benefits on attorneys¹⁵⁹ - Confer benefits on third parties¹⁶⁰

¹⁴⁷ *Powers of Attorney Act 2016* (ACT) s 13.

¹⁴⁸ *Ibid* s 41.

¹⁴⁹ *Ibid* s 16(1).

¹⁵⁰ *Ibid* s 33.

¹⁵¹ *Ibid* s 34.

¹⁵² *Ibid* s 38.

¹⁵³ *Ibid* s 40.

¹⁵⁴ *Ibid* s 42.

¹⁵⁵ *Ibid* s 35-7.

¹⁵⁶ *Powers of Attorney Act 2003* (NSW) s.9

			<p>(Schedule 3 prescribes expressions to authorise gifts, and authorising benefits for the attorney or other names third parties).</p> <p>Not authorised –</p> <ul style="list-style-type: none"> - Act as a trustee¹⁶¹
NT	<i>Advance Personal Planning Act 2014</i> (NT) (from 17/3/14)	<p>An adult may appoint a decision maker for (i) care or welfare (including health care) or (ii) property or financial affairs.</p> <p>Examples for (ii) – banking, receipt and payment of money, property (including real estate) ownership, management of assets, carrying on a trade or business, holding a licence or permit, insurance for an adult or his or her property, legal matters (other than those mentioned in section 24(1)(e).)¹⁶²</p> <p>If an adult does not identify the matter or matters for which the decision maker is appointed, the decision maker is appointed for all matters.</p> <p>Financial management power is defined as “authority to make decisions in relation to the management of all or part of the represented adult’s property and financial affairs”.¹⁶³</p>	<p>Excluded matters – a decision maker is not authorised to do any of the following for the represented adult:</p> <ul style="list-style-type: none"> (a) vote (b) consent to adoption of a child of the adult (c) consent to the marriage, or dissolution of the marriage of the adult (d) make, vary or revoke the following for the adult: a will, a power of attorney, an advance personal plan (e) exercise the adult’s rights as an accused person in relation to a criminal investigation or criminal proceedings, including under Part 10 of the <i>Mental Health and Related Services Act</i>.

¹⁵⁷ Ibid s 45.

¹⁵⁸ Ibid s 11.

¹⁵⁹ Ibid s 12.

¹⁶⁰ Ibid s 13.

¹⁶¹ Ibid s 10.

¹⁶² *Advance Personal Planning Act* (NT) s 16.

¹⁶³ Ibid s 3.

		The decision maker's authority is subject to the Act and the terms of the advance personal plan by which the decision maker was appointed. ¹⁶⁴	
QLD	<i>Powers of Attorney Act 1998 (Qld)</i>	<p>s.32(1) By an EPOA a principal may:</p> <p>(a) authorise 1 or more persons who are eligible attorneys to do anything in relation to 1 or more financial matters or personal matters . . . <u>that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised</u>; (Note – does not include special personal or special health matters); and</p> <p>(b) provide terms or information about exercising the power.</p>	<p>Excluded matters – special personal or special health matters</p> <p>A <i>special personal matter</i>, for a principal, is a matter relating to 1 or more of the following—</p> <p>(a) making or revoking the principal's will;</p> <p>(b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the principal;</p> <p>(c) exercising the principal's right to vote in a Commonwealth, State or local government election or referendum;</p> <p>(d) consenting to adoption of a child of the principal under 18 years;</p> <p>(e) consenting to marriage of the principal;</p> <p>(f) consenting to the principal entering into a civil partnership;</p> <p>(g) consenting to the principal terminating a civil partnership;</p> <p>(h) entering into, or agreeing to enter into, a surrogacy arrangement under the <u><i>Surrogacy Act 2010</i></u>;</p> <p>(i) consenting to the making or discharge of a parentage order under the <u><i>Surrogacy Act 2010</i></u>.¹⁶⁵</p>

¹⁶⁴ Ibid s 20(3).

¹⁶⁵ *Powers of Attorney and Agency Act 1998 (Qld)* sch 2, pt 2, s 3.

			<p>Special health matters includes</p> <p>(a) removal of tissue from the principal while alive for donation to someone else;</p> <p><i>Note</i>— For the situation after the principal has died, see the <u><i>Transplantation and Anatomy Act 1979</i></u>, particularly <u>section 22</u>.</p> <p>(b) sterilisation of the principal;</p> <p>(c) termination of a pregnancy of the principal;</p> <p>(d) participation by the principal in special medical research or experimental health care;</p> <p>(e) electroconvulsive therapy or a non-ablative neurosurgical procedure for the principal;</p> <p>(f) prescribed special health care of the principal.¹⁶⁶</p> <p>Unless expressly authorised –</p> <ul style="list-style-type: none"> - Avoid conflict transactions¹⁶⁷
SA	<i>Powers of Attorney and Agency Act (SA)</i>	Donee has the power to do on behalf of the donor anything that can lawfully be done by an attorney, subject to any conditions, limitations or exclusions set out in the power of attorney. ¹⁶⁸	
TAS	<i>Powers of Attorney Act 2000 (Tas)</i>	s.31(1) an EPOA – (a) may confer general authority (ss(2)) on the attorney to act on the donor’s behalf in respect of all or a specified part of the <u>property and affairs</u> of the donor, or more	Do not include a power to make a decision in relation to a personal matter. A person matter is a decision that relates to the private life, lifestyle or health of the donor, including:

¹⁶⁶ Ibid sch 2, pt 2, s7.

¹⁶⁷ Ibid s 73.

¹⁶⁸ *Powers of Attorney and Agency Act 1984 (SA)* s 5.

		<p>confer on him or her authority to do specified acts ... and</p> <p>(b) may be expressed to operate only during such period as may be specified in the POA, and</p> <p>in any such case, the authority may be conferred subject to conditions or restrictions.¹⁶⁹</p> <p>(2) Where an instrument is expressed to confer general authority on the attorney, it operates to confer, subject to any conditions or restrictions specified in the instrument, <u>authority to do on behalf of the donor any act which the donor can lawfully do by an attorney.</u>¹⁷⁰</p> <p>Including but not limited to:</p> <p>(a) collect, receive and recover any income or property to which the donor is entitled;</p> <p>(b) invest money</p> <p>(c) lease real estate</p> <p>(d) exercise any power of leasing</p> <p>(e) surrender/accept any lease, accept surrender or renew lease</p> <p>(f) sell, exchange, partition or convert into money any property other than real estate</p> <p>(g) as above, real estate</p>	<p>(a) where or who the donor lives with</p> <p>(b) whether the donor works, if so the kind and place of work</p> <p>(c) as above, education or training</p> <p>(d) whether the donor applies for a licence other than for the conduct of a business/commercial reasons</p> <p>(e) day to day matters relating to diet, recreation, hobbies, companions, pet ownership, sexual expression, dress, hairstyle, persons with whom the donor associates or clubs, associations or political parties that the donor may join</p> <p>(f) consenting to the adoption of a child of the donor</p> <p>(g) consenting to the donor marrying, separating or divorcing, or entering into or terminating, a personal relationship with the meaning of the Relationships Act 2003</p> <p>(h) entering into or agreeing to a surrogacy arrangement or consenting to the making or discharge of a parenting order under the Surrogacy Act 2012</p> <p>(i) the health care of, or the withdrawal of health care from, the donor, including any decisions relating to organ donation, pregnancy termination or conception, treatment to render the donor temporarily or permanently infertile or participation in health research</p>
--	--	--	---

¹⁶⁹ Powers of Attorney Act 2000 (Tas) s 31(1).

¹⁷⁰ Ibid s 31(2).

		<p>(h) mortgage, purchase, acquire, lease or charge any property or sever any joint tenancy</p> <p>(i) power in respect of superannuation</p> <p>(j) pay debts, settle, adjust or compromise any demand, discharge any encumbrance on the estate, reimburse anyone who has expended money for the benefit of the donor</p> <p>(k) renounce the donor's right to apply for a grant of probate (where donor appointed as executor)</p> <p>(l) as above, letters of administration</p> <p>(m) carry on any trade, profession or business the donor carried on</p> <p>(n) agree to any alteration of the conditions of any partnership into which any donor has entered or to a dissolution and distribution of the assets of the partnership</p> <p>(o) bring and defend actions and other legal proceedings in the name of the donor</p> <p>(p) execute and sign deeds, instruments and other documents</p> <p>(q) complete any contract for the performance of which the donor was liable or enter into any agreement terminating liability</p> <p>(r) pay sums, or use the donor's property, for the maintenance and education of the donor's spouse or any child, parent or other person dependent on the donor</p>	<p>or psychological treatment.</p> <p>An attorney is not competent to appoint another person to perform any functions or exercise any powers in his or her capacity as such.¹⁷²</p> <p><i>Gifts</i></p> <p>Unless there is a contrary intention in the EPOA, an attorney may give away any property of the donor only if-</p> <p>(a) the gift is –</p> <ul style="list-style-type: none"> - to a relation or close friend of the donor; and - of a seasonal nature or on the occasion of a special event (including, for example, a birth or marriage); or <p>(b) the gift is a donation of the nature that the donor made when the donor had mental capacity or that the donor might reasonably be expected to make-</p> <p>and in either case, the value of the gift is reasonable having regard to all the circumstances and, in particular, the donor's financial circumstances.</p> <p>An attorney, or a charity with which the attorney has a connection is not precluded from receiving a gift.</p> <p>The Board may authorize the attorney to make a gift of any property of the donor to any person and for any purpose approved by the Board.¹⁷³</p>
--	--	--	--

¹⁷² Ibid s 32(2).

¹⁷³ Ibid s 31(3)-(5).

		<p>(s) expend money in the insurance, repair, maintenance, renovation, reconstruction or preservation of any property</p> <p>(t) do all matters necessary or incidental to the performance of any of the matters specified in this subsection and apply any money, or any property, which it is necessary to apply for the purposes of this Act; and</p> <p>(u) exercise any power, including a power to consent, vested in the donor, whether beneficially, or as a trustee, or otherwise.¹⁷¹</p>	
VIC	<i>Powers of Attorney Act 2014 (Vic)</i>	<p>Section 22 Enduring power of attorney</p> <p>(1) By an EPOA a person may authorise an eligible attorney to do <u>anything on behalf of the person that a person can lawfully do by an attorney</u></p> <p>(2) ... a person may make an EPOA for personal or financial matters or both.</p> <p>Section 3 definitions-</p> <p>Financial matter ... means any matter relating to the principal's financial or property affairs, and includes any legal matter that relates to the financial or property affairs of the principal. (See list of examples, (a) – (p))</p> <p>Legal matter ... means</p> <p>(a) use of legal services for the principal's benefit; or</p> <p>(b) bringing or defending a legal proceedings or hearing in a court, tribunal or other body on behalf of the principal, including settling a claim before or after a legal proceeding or hearing starts. (<i>Examples – the</i></p>	<p>Section 26 – matters for which power cannot be given under an EPOA</p> <p>... a principal under and EPOA is not able to authorise an attorney under that power to –</p> <p>(a) make or revoke a will for the principal</p> <p>(b) make or revoke an EPOA</p> <p>(c) vote</p> <p>(d) consent to the entering into or dissolution of marriage of the principal or of a sexual relationship of the principal</p> <p>(e) make or give effect to a decision about the care and wellbeing of any children of the principal or about the adoption of a child under 18 of the principal</p> <p>(f) enter into or agree to enter into a surrogacy arrangement</p> <p>(g) consent to making or discharge of a substitute</p>

¹⁷¹ Ibid s 31.

		<p><i>use of legal services to obtain information about the principal's legal rights; the use of legal services to make a transaction).</i></p> <p>Section 24 Conditions and instructions in an enduring power of attorney</p> <p>A person making an enduring power of attorney may place conditions on the exercise of the power or give instructions about the exercise of the power.¹⁷⁴</p>	<p>parentage order</p> <p>(h) manage the estate of the principal on the death of the principal or</p> <p>(i) consent to an unlawful act.</p>
WA	<i>Guardianship & Administration Act 1990 (WA)</i>	<p>Property and financial matters only.</p> <p>This can involve decisions about day to day budgeting, banking, investments, and decisions about the purchase or sale of property and any other matters which arise in relation to financial affairs.¹⁷⁵</p> <p>Statutory Review Recommendation 8 – include a statement in the definition of ‘enduring power of attorney’ that the power relates to property and financial matters.¹⁷⁶</p>	<p>An attorney cannot:</p> <ul style="list-style-type: none"> - do any act requiring the donor’s personal skill or discretion, for example – swear an affidavit, make a statutory declaration, make a will, vote, exercise donor’s powers as trustee or executor - do any act which is illegal / has an unlawful purpose - deal with property held in trust by the donor (unless deed allows) - perform functions of a director or secretary of a company - appoint a substitute attorney - dispose of an asset at less than market value when this is not in the donor’s best interests¹⁷⁷ however if the donor still has capacity to instruct that it be done, then generally speaking, the donor would act on those instructions.

¹⁷⁴ Powers of Attorney Act 2014 (Vic) s 25.

¹⁷⁵ Government of Western Australia Department of the Attorney General, *A Guide to Enduring Power of Attorney in Western Australia*, 20 www.publicadvocate.wa.gov.au/files/EPA_Guide.pdf

¹⁷⁶ Western Australian Department of Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*, (November 2015), 8 www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/.../tp-3697.pdf

¹⁷⁷ Western Australian Department of the Attorney General, *A Guide to Enduring Power of Attorney in Western Australia*, 20 www.publicadvocate.wa.gov.au/files/EPA_Guide.pdf

Table 9 - Gifts

ACT	NSW	NT	QLD
<p>Gifts not authorised by the EPOA.¹⁷⁸</p> <p>If authorised in the EPOA (however described), authorises the following gifts:</p> <p>(a) A gift made to a relative or close friend of the principal for a celebration or special event (examples, birthday, Easter, Hanuka, birth, marriage, graduation);</p> <p>(b) A gift that is a donation of a kind that –</p> <p>(i) the principal made when had capacity; or</p> <p>(ii) the principal might reasonably be expected to make.¹⁷⁹</p> <p>However, does not authorise a gift if the value is more than is reasonable to make.¹⁸⁰</p>	<p>s.11(1) A prescribed POA does not authorise an attorney to give a gift of all or any property of the principal to any other person unless the instrument creating the power expressly authorises the giving of the gift.</p> <p>s.11(2) A prescribed POA that includes a prescribed expression set out in Schedule 3, authorises the attorney to give the kinds of gifts that are specified by the Schedule for that expression.¹⁸¹</p> <p>Schedule 3 prescribes an expression for the purposes of section 11(2) –</p> <p>(1) the prescribed expression is “I authorise my attorney to give reasonable gifts as provided by section 11(2) of the POA Act 2003</p> <p>(2) this authorises an attorney to give a gift only if:</p> <p>(a) the gift is:</p> <p>(i) to a relative or close friend</p>	<p>(1) A decision maker who has financial management powers may make a gift from the represented adult’s property if;</p> <p>(a) the gift is of a kind the represented adult:</p> <p>(i) made when he or she had decision-making capacity for the matter; or</p> <p>(ii) might reasonably be expected to make; and</p> <p>(b) the value of the gift is reasonable in the circumstances.</p> <p>(2) However, the represented adult may, in the advance personal plan that appoints the decision maker:</p> <p>(a) restrict the decision maker’s authority to make gifts; or</p>	<p>s.88 <i>Powers of Attorney Act 1998</i> (Qld)</p> <p>(1) Unless there is a contrary intention expressed in the EPOA, an attorney for financial matters for an individual may give away the principal’s property only if:</p> <p>(a) the gift is</p> <p>(i) to a relation or close friend of the principal; and</p> <p>(ii) of a seasonal nature or because of a special event (including for example a birth or marriage) or</p> <p>(b) the gift is a donation of the nature that the principal made when the principal had capacity or that the principal might reasonably be expected to make;</p> <p>and the gift’s value is not more than what is reasonable having regard to all the circumstances and, in particular, the</p>

¹⁷⁸ *Powers of Attorney Act 2006* (ACT) s 38.

¹⁷⁹ *Ibid* s 39.

¹⁸⁰ *Ibid* s 39.

¹⁸¹ *Powers of Attorney Act 2003* (NSW) s 11.

	<p>of the principal and</p> <p>(ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage), or</p> <p>(b) the gift is a donation of the nature that the principal made when the principal had capacity or the principal might reasonably be expected to make,</p> <p>and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.</p> <p>Close friend – another individual who has a close personal relationship with the principal and a personal interest in the principal's welfare</p> <p>Relative means -</p> <p>– a mother, father, wife, husband, daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother or grandchild of the principal, or</p> <p>- if the principal is a party to a registered relationship, interstate registered relationship or domestic relationship, any person who is a relative of either party to the relationship.¹⁸²</p>	<p>(b) authorise the decision maker to make a gift not otherwise permitted by this section.</p> <p>(3) Further, the Tribunal may, by order under section 59(2)(c), authorised the decision maker to make a gift not otherwise permitted by this section.</p> <p>(4) Despite subsection (1), the decision maker must not make a gift from the represented adult's property to decision maker unless specifically authorised to do so under subsection (2)(b) or (3).¹⁸³</p>	<p>principal's financial circumstances.</p> <p>(2) The attorney or a charity with which the attorney has a connection is not precluded from receiving a gift under subsection (1).¹⁸⁴</p> <p>But note:-</p> <p><i>Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)</i></p> <p>New s.88 Gifts and donations:</p> <p>(1) Unless otherwise authorised under this Act, an attorney for a principal may give away or donate the principal's property only if –</p> <p>(a) The gift or donation is –</p> <p>(i) Of the nature the principal made when the principal had capacity; or</p> <p>(ii) Of the nature the principal might reasonably be expected to make; and</p> <p>(b) The value of the gift or donation is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.</p> <p>(2) The attorney, or a charity with which</p>
--	---	---	--

¹⁸² Ibid sch 3.

			the attorney has a connection, is not precluded from receiving a gift or donation under subsection (1). ¹⁸⁵
SA	TAS	VIC	WA
No express provisions	<p>Unless there is a contrary intention in the EPOA, an attorney may give away any property of the donor only if-</p> <p>(c) the gift is –</p> <ul style="list-style-type: none"> - to a relation or close friend of the donor; and - of a seasonal nature or on the occasion of a special event (including, for example, a birth or marriage); or <p>(d) the gift is a donation of the nature that the donor made when the donor had mental capacity or that the donor might reasonably be expected to make-</p> <p>and in either case, the value of the gift is reasonable having regard to all the</p>	<p>An attorney may make a gift of the principal's property only if –</p> <p>(a) the gift is reasonable having regard to all the circumstances, in particular the principal's financial circumstances; and</p> <p>(b) the gift is –</p> <ul style="list-style-type: none"> (i) to a relative or a close friend of the principal and is of a seasonal nature or for a special event (eg birth or a marriage); or (ii) a type of donation that the principal made when the principal had decision making capacity for the matter or that the principal might reasonably be expected to make. <p>A gift may be made to the attorney or relative/org with whom the attorney has</p>	<p>There is nothing in the Act to say an attorney can or cannot give money for presents or make gifts from the estate.¹⁸⁸</p> <p>The Tribunal has decided (DD [2007] WASAT 192) that an attorney is not prevented from making a gift on behalf of a donor (unless the EPOA prohibits gifts).¹⁸⁹</p> <p>However, the Tribunal held that it is not appropriate for the Tribunal to order the donees to gift themselves and sibling from estate. The donees must ensure that they comply with their fiduciary obligations.¹⁹⁰</p> <p>The case of DD is not SAT's only decision on gifting by EPAs. The law gives substantial latitude to donees of EPAs. There is currently no blanket ban on donees making gifts to themselves. In DW and JM¹⁹¹ [2006] WASAT 366, SAT said that donees can make gifts in some</p>

¹⁸³ Advance Personal Planning Act (NT) s 32.

¹⁸⁴ Powers of Attorney Act 1998 (Qld) s 88.

¹⁸⁵ *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) cl 70.

¹⁸⁸ Government of Western Australia Department of the Attorney General, *A Guide to Enduring Power of Attorney in Western Australia*, 39

<www.publicadvocate.wa.gov.au/files/EPA_Guide.pdf>

¹⁸⁹ DD [2007] WASAT 192 [26] 6.

¹⁹⁰ DD [2007] WASAT 192.

¹⁹¹ DW and JM [2006] WASAT 366.

	<p>circumstances and, in particular, the donor's financial circumstances.</p> <p>An attorney, or a charity with which the attorney has a connection is not precluded from receiving a gift.</p> <p>The Board may authorize the attorney to make a gift of any property of the donor to any person and for any purpose approved by the Board.¹⁸⁶</p>	<p>a connection.</p> <p>An attorney must keep a written record of any gift by the attorney that is made to the attorney, or a relative or close friend of the attorney, or an organisation with which the attorney has a connections; and the total value is over the prescribed amount or if an amount has not been prescribed, \$100.¹⁸⁷</p>	<p>circumstances. That decision was not directed at donees personally benefitting from such gifts, although paragraph [40] touched on it.</p> <p>In KS¹⁹² [2008] WASAT 29, the then-President of SAT, Justice Barker, said that generally speaking, donees of enduring powers of attorney could not make gifts to themselves, but there were some exceptions and qualifications on that (see paragraphs [50] to [57]).</p> <p>Statutory Review – Recommendation 62 – that the Act is amended so that section 107 provides that the donee shall not make gifts (to others or themselves) on behalf of the donor unless the donor still has capacity and has given direction about the gift, or unless specified in the EPA, or is authorised by the SAT.¹⁹³</p>
--	--	---	---

¹⁸⁶ *Powers of Attorney Act 2000* (Tas) s 31(3)-(5).

¹⁸⁷ *Powers of Attorney Act 2014* (Vic) s 67.

¹⁹² *KS* [2008] WASAT 29.

¹⁹³ Department of the Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*, (November 2015) 32

<[http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3913697cc31f70b26648cd4748257f100012c4df/\\$file/tp-3697.pdf](http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3913697cc31f70b26648cd4748257f100012c4df/$file/tp-3697.pdf)>

Table 10 - Maintenance of dependants

ACT	NSW	NT	QLD
<p>No special authorisation required.</p> <p>An attorney for a property matter may provide for the needs of a dependant of the principal. However, unless contrary intention expressed in the EPOA, must not be more than what is reasonable in the circumstances.¹⁹⁴</p> <p>See also s.40, the EPOA can expressly authorise the payment of reasonable living expenses for a named person. Covers reasonable costs of specifically housing, food, education, transportation and medical care and medication.</p>	<p>Authorisation in the EOPA required.</p> <p>The prescribed power does not authorise an attorney to execute an assurance of other document, or do any other act, as a result of which a benefit would be conferred on a third party unless the instrument creating the power expressly authorises the conferral of the benefit.¹⁹⁵</p> <p>A prescribed POA that includes the prescribed expression ... set out in Schedule 3 authorises an attorney to confer on a third party the kinds of benefits that are specified by that Schedule.</p> <p>Schedule 3 – 2 Authority to confer benefits on third parties.</p> <p>The prescribed expression is – I authorise my attorney to confer benefits on <i>[insert name(s) and address(es) of each third party]</i> to meet their reasonable living and medical expenses as provided by section 13(2) of the POA Act.</p> <p>The prescribed expression authorises an</p>	<p>No special authorisation required.</p> <p>A decision maker may provide from the represented adult's property for the needs of a dependant of the represented adult if:</p> <ul style="list-style-type: none"> (a) the provision is of a kind the represented adult <ul style="list-style-type: none"> (i) made when had decision-making capacity for the matter; or (ii) might reasonably be expected to make; and (b) the value of the provision is reasonable in the circumstances. <p>However, the represented adult may:</p> <ul style="list-style-type: none"> (a) restrict the authority to provide for the needs of dependants; or (b) authorise the decision maker to make provision for the needs of a dependant that is not 	<p>No special authorisation required.</p> <p>An attorney for financial matters may provide from the principal's estate for the needs of a dependant of the principal.</p> <p>However, unless there is a contrary intention expressed in the EPOA, what is provided must not be more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.¹⁹⁸</p>

¹⁹⁴ Powers of Attorney Act 2006 (ACT) s 41.

¹⁹⁵ Powers of Attorney Act 2003 (NSW) s 12.

¹⁹⁸ Powers of Attorney Act 1998 (Qld) s 89.

	<p>attorney to confer a benefit on a third party only if:</p> <p>(a) the benefit meets, in whole or part, any expenses incurred (or to be incurred) by the attorney in respect of any of the following: housing, food, education, transportation, medical care and medication, and</p> <p>(b) the benefit is not more than what is reasonable having regard to all the circumstances and in particular, the principal's financial circumstances and the size of the principal's estate.¹⁹⁶</p>	<p>otherwise permitted</p> <p>Further, the Tribunal may authorise the decision maker to make provision for the needs of a dependant that is not otherwise permitted.</p> <p>Despite the above, if the decision maker is a dependant of the represented adult, the decision maker must not make provision from the represented adult's property for the decision maker's own needs unless specifically authorised to do so.¹⁹⁷</p>	
SA	TAS	VIC	WA
No specific reference - but see comments in relation to fiduciary obligations in obligations of attorneys Table 5.	<p>No special authorisation required to pay sums, or use the donor's property, for the maintenance and education of the donor's spouse or any child, parent or other person dependent on the donor¹⁹⁹</p> <p>Included within general power – see s.32(1B)(b)</p> <p>(1B) For the purposes of this section, an exercise of a power under an EPOA is not to be taken to constitute a failure to protect the interests of the donor, and is to be taken to be in the best interests of</p>	<p>Authorisation in the EPOA required.</p> <p>An attorney for financial matters may provide for the needs of a dependant of the principal, <i>if the enduring power of attorney so provides</i>.²⁰¹</p> <p>Unless the EPOA otherwise provides, a provision under ss(1) must not be more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.²⁰²</p>	<p>No specific reference – but see comments in relation to fiduciary obligations in obligations of attorneys Table 5.</p> <p>The Statutory Review recommended that Part 9 of the <i>Guardianship and Administration Act 1990</i> be amended to provide similar detail in explaining an enduring power of attorney as is provided in Part 9A regarding enduring powers of guardianship (recommendation 52).</p>

¹⁹⁶ *Powers of Attorney Act 2003* (NSW) sch 3.

¹⁹⁷ *Advance Personal Planning Act* (NT) s 33.

¹⁹⁹ *Powers of Attorney Act 2000* (Tas) s 31.

²⁰¹ *Powers of Attorney Act 2014* (Vic) s 68.

²⁰² *Ibid* s 68(2).

	<p>the donor if-</p> <ul style="list-style-type: none"> (c) it is an exercise of a power that the donor would have been likely to make if he or she were not subject to a mental incapacity; or (d) the exercise of the power consists of providing for those persons who the donor would expect to provide for, if he or she were not subject to a mental incapacity.²⁰⁰ 		<p>This recommendation will ensure the legislation provides a list of the things a donee can do on behalf of a donor, unless the EPA states otherwise. The list will include paying expenses for the donor and any dependents of the donor relating to maintenance and accommodation, including the purchase of property (similar to the Victorian <i>Powers of Attorney Act 2014</i>).</p>
--	--	--	---

²⁰⁰ *Powers of Attorney Act 2000* (Tas) s 32(1B)(b).

Table 11 - Conflict transactions

ACT	NSW	NT	QLD
<p>Not unless authorised.</p> <p>A power of attorney does not authorise an attorney to execute an assurance or other document, or do anything else that would result in a benefit being given to the attorney unless expressly authorised.²⁰³</p>	<p>The prescribed power does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit conferred on the attorney unless the instrument creating the power expressly authorises the conferral of the benefit.²⁰⁴</p> <p>A prescribed POA that includes the prescribed expression ... set out in Schedule 3 authorises an attorney to confer on the attorney the kinds of benefits that are specified by that Schedule.</p> <p>Schedule 3 – 2 Authority to confer benefits on attorney.</p> <p>The prescribed expression is – I authorise my attorney to confer benefits on the attorney to meet the attorney’s reasonable living and medical expenses as provided by section 12(2) of the POA Act.</p> <p>The prescribed expression authorises an attorney to confer a benefit on the</p>	<p>There are no express restrictions on conflict transactions generally in the <i>Advance Personal Planning Act</i> (NT).</p> <p>There are limits on gifts²⁰⁶ and maintenance of dependants²⁰⁷.</p>	<p>Section 73 of the <i>Powers of Attorney Act 1998</i> (Qld) outlines an attorney’s duty not to enter into a conflict transaction and provides when a conflict transaction may be allowable by QCAT and what constitutes a conflict transaction.</p> <p>(1) an attorney ... may enter into a conflict transaction <i>only if the principal authorises</i> the transaction, conflict transactions of that type or conflict transactions generally.</p> <p>(2) a conflict transaction is a transaction in which there may be a conflict, or which results in conflict between –</p> <p>(a) the duty of an attorney towards the principal; and</p> <p>(b) either –</p> <p>(i) the interest of the attorney, or a relation, business associate or close friend of the attorney; or</p> <p>(ii) another duty of the attorney</p>

²⁰³ *Powers of Attorney Act 2006* (ACT) s 34.

²⁰⁴ *Powers of Attorney Act 2003* (NSW) s 12.

²⁰⁶ *Advance Personal Planning Act* (NT) s 32.

²⁰⁷ *Ibid* s 33.

	<p>attorney only if:</p> <p>(c) the benefit meets, in whole or part, any expenses incurred (or to be incurred) by the attorney in respect of any of the following: housing, food, education, transportation, medical care and medication, and</p> <p>(d) the benefit is not more than what is reasonable having regard to all the circumstances and in particular, the principal's financial circumstances and the size of the principal's estate.²⁰⁵</p>		<p>(examples are provided)</p> <p>The <i>Guardianship and Administration and Other Legislation Amendment Bill 2018</i> (Qld) (the Bill) clarifies the scope of a conflict transaction and recasts the conflict transaction provisions to clearly reflect the need for attorneys to have prospective authorisation prior to entering into a conflict transaction on behalf of an adult (clause 73).</p> <p>New subsection 73(1A) of the Bill makes it clear that a principal may retrospectively authorise a conflict transaction, if the principal has capacity to do so.</p> <p>The amendments in clause 35 of the Bill (section 152 of the <i>Guardianship and Administration Act</i> (Qld)) clarify that QCAT may prospectively or retrospectively authorise a conflict transaction.</p> <p>Section 152 is recast to provide that until QCAT retrospectively authorises a conflict transaction, an administrator has still acted contrary to his or her duty to avoid conflict transactions.</p> <p>Clauses 20 and 68 of the Bill amends the GAA and POA Act to provide clearer examples of conflict transactions.</p> <p>Clause 74 amends s106(1)(b) of the <i>Powers of Attorney Act 1998</i> (Qld) to provide that the Supreme Court or QCAT may order an attorney for a principal to</p>
--	--	--	--

²⁰⁵ *Powers of Attorney Act 2003* (NSW) sch 3.

			pay an amount to the principal (or if the principal has died, the principal's estate) to account for any profit the attorney has accrued as a result of the attorney's failure to failure to comply with the POA (including entering into a conflict transaction) in the exercise of a power.
SA	TAS	VIC	WA
There are no express restrictions on conflict transactions in the <i>Powers of Attorney and Agency Act 1984</i>	<p>Can't benefit attorney unless expressly authorised</p> <p>An EPOA does not authorize the attorney to execute an assurance or other document, or do anything else that would result in a benefit being received by the attorney, unless the POA expressly authorises the attorney to take an action that would result in a benefit being received by the attorney.²⁰⁸</p> <p>May only enter into conflict transaction if specified in the power – the power can authorize any transaction that might result in a conflict</p> <p>s.32AC(1) An attorney under an EPOA may only enter into a transaction that results, or may result in, a conflict of interest if –</p> <p>(a) the EPOA specifies that the</p>	<p>An attorney has a duty not to enter into a transaction if there is or may be a conflict of interest unless the power so authorises or the transaction is permitted under section 65 (does not apply to a gift, maintenance of a dependant of the principal or a transaction concerns property held jointly by the attorney)²¹⁰</p> <p>Permitted conflict transactions –</p> <ul style="list-style-type: none"> - If the principal authorises the attorney to enter into the transaction, the kind or transaction or conflict transactions generally - If the principal validates the entering into of the transaction if the principal has DMC at the time - If VCAT authorises prior to the attorney entering into the transaction, the kind or transaction 	There are no express restrictions on conflict transactions in the <i>Guardianship and Administration Act 1990 (WA)</i> , however the Statutory Review recommended amendments to deal with potential conflicts of interest where a professional person is proposed as administrator (Recommendation 39)

²⁰⁸ *Powers of Attorney Act 2000 (Tas)* s 32AB.

²¹⁰ *Powers of Attorney Act 2014 (Vic)* s 63(d) & 64.

	<p>transaction may be entered into</p> <p>(b) the transaction is a member of a class of transactions the EPOA specifies may be entered into</p> <p>(c) the EPOA specifies that any transaction that may result in a conflict may be entered into by the attorney</p> <p>(2) A conflict of interest is a conflict between –</p> <p>(a) the duties of an attorney in respect of the donor; and</p> <p>(b) either (i) the interests of the attorney, or a relative, business associate or close friend of the attorney, or (ii) another duty of the attorney</p> <p>(3) Not a conflict only because concerns an interest in property held jointly with the attorney.²⁰⁹</p>	<p>or conflict transactions generally</p> <p>- If VCAT validates the conflict transaction that has been completed.²¹¹</p>	
--	---	--	--

²⁰⁹ *Powers of Attorney Act 2000* (Tas) s 32AC.

²¹¹ *Powers of Attorney Act 2014* (Vic) s 65.

Table 12 - Record keeping

ACT	NSW	NT	QLD
<p>An attorney must, while the principal has impaired decision-making capacity, keep accurate records and accounts of all dealings and transactions made under the power.²¹²</p>	<p>Clause 6, Schedule 2 Attorney responsibilities</p> <ul style="list-style-type: none"> (a) keep your money and property separate from the attorney's money and property (b) keep reasonable accounts and records of your money and property²¹³ <p>The Powers of Attorney Act also empowers the Tribunal to make an order requiring an attorney to produce accounts and records.²¹⁴</p>	<ul style="list-style-type: none"> (1) A decision maker must: <ul style="list-style-type: none"> (a) keep the records in relation to the exercise of the decision maker's authority that it would be reasonable in the circumstances to keep; and (b) comply with any record keeping and reporting requirements prescribed by regulation (2) Without limiting what might be provided for in the regulations, a regulation may provide for one or more of the following: <ul style="list-style-type: none"> (a) keeping of records (b) preparation of annual or other reports (c) auditing or other verification of records and reports (d) the form of records or reports (e) who must or may be give copies of, or access to, records or reports.²¹⁵ 	<p>An attorney for a financial matter must keep and preserve accurate records and accounts of all dealings and transactions made under the power.²¹⁶</p> <p>Note – Under the <i>Public Guardian Act 2014</i>, section 21, the public guardian may, upon the provision of written notice to an attorney, require a summary of receipts and expenditure for a specified period. The <i>Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)</i> provides that this power may be exercised even after the principal's death.²¹⁷</p> <p>The <i>Powers of Attorney Act 1998 (Qld)</i> also provides a presumption of undue influence in relation to a transaction between a principal and an attorney or associate of an attorney.²¹⁸</p> <p>The Supreme Court or QCAT may order that an attorney file in the court a summary of receipts and expenditure under the power for a specified time.²¹⁹</p>

²¹² *Powers of Attorney Act 2006 (ACT)* s 47.

²¹³ *Powers of Attorney Regulations 2016 (NSW)* sch 2 Prescribed forms for power of attorney.

²¹⁴ *Powers of Attorney Act 2003 (NSW)* s 36(4)(g).

²¹⁵ *Advance Personal Planning Act (NT)* s 30.

²¹⁶ *Powers of Attorney Act 1998 (Qld)* s 85.

²¹⁷ *Guardianship and Other Legislation Amendment Bill 2018 (Qld)* cl 88.

²¹⁸ *Powers of Attorney Act 1998 (Qld)* s.87.

		<p><i>Advance Personal Planning Regulations (NT)</i></p> <p>Regulation 5</p> <p>(1) For section 30(1)(b) of the Act, a decision maker must, at all times while the decision maker has authority to exercise financial management powers for the adult, keep complete and up-to-date records of the adult's assets and liabilities.</p> <p>(2) The records must include:</p> <p>(a) sufficient information to identify each of the adult's assets and liabilities; and</p> <p>(b) for each asset and liability, information related to:</p> <p>(i) all dealings and transactions with the asset or liability; and</p> <p>(ii) the condition and management of the asset or liability; and</p> <p>(c) any other information reasonably necessary to demonstrate that the adult's property and financial affairs are being managed in accordance with the Act.</p>	<p><i>The Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)</i> clarifies that this power that may be exercised by the Supreme Court or QCAT continues to apply even after the principal's death or if the enduring power has been revoked.²²⁰</p>
SA	TAS	VIC	WA

²¹⁹ *Powers of Attorney Act 1998 (Qld)* s 122 and *Guardianship and Administration Act 2000 (Qld)* s 153 and 138AA.

²²⁰ *Guardianship and Other Legislation Amendment Bill 2018 (Qld)* cl 36 and 77.

<p>It is an offence if the donee of enduring power fails to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power.²²¹</p>	<p>An attorney under an EPOA must keep an accurate record of all dealings and transactions made as the attorney. (Fine not exceeding 20 penalty units)</p> <p>A person who has ceased to be an attorney under an EPOA must</p> <p>(a) retain, for at least 7 years, an accurate record of all dealings and transactions made as the attorney</p> <p>(b) <u>provide to the Board</u> an accurate record of all dealings and transactions made as the attorney. (Fine not exceeding 20 penalty units)</p> <p>The Board, after receiving a request in relation to a person who is or has been within the previous 7 years and attorney under an EPOA and who has not provided an accurate record to the Board in accordance with subsection (2)(b), may by notice in writing to the person, require the person to provide to the Board, within a period of not less than 14 days specified in the notice, a document setting out an accurate record of all dealings and transactions made as the attorney.</p> <p>The attorney who receives such a notice must provide the document to the Board</p>	<p>An attorney under an EPOA must keep accurate records and accounts of all dealings and transactions made for financial matters.²²³</p> <p>An attorney must keep a written record of any gift by the attorney that is made to the attorney, or a relative or close friend of the attorney, or an organisation with which the attorney has a connections; and the total value is over the prescribed amount or if an amount has not been prescribed, \$100.²²⁴</p>	<p>Shall keep and preserve accurate records and accounts of all dealings and transactions made under the power.²²⁵</p>
--	---	--	---

²²¹ Powers of Attorney and Agency Act 1984 (SA) s 8.

²²³ Powers of Attorney Act 2014 (Vic) s 66.

²²⁴ Ibid s 67.

²²⁵ Guardianship and Administration Act 1990 (WA) s 107(1)(b).

	<p>(penalty – fine not exceeding 20 penalty units)</p> <p>The document provided to the Board</p> <ul style="list-style-type: none"> (a) is to be in a form approved by the Board (b) is to be verified by a statutory declaration that is signed by the person and (c) is to be accompanied by other evidence, if any, that the Board specifies in the notice is required to accompany the document.²²² 		
--	---	--	--

²²² Powers of Attorney Act 2000 (Tas) s 32AD.

Table 13 - Separation of attorney's and principal's property

ACT	NSW	NT	QLD
An attorney must, while the principal has impaired DMC, keep the attorney's property separate from the principal's property. ²²⁶	Schedule 2, Clause 6, Attorney responsibilities – an attorney should keep the attorney's own money and property separate from the principal's money and property. ²²⁷	A decision maker who has financial management powers must deal with the represented adult's property as if it were trust property held by the decision maker on trust for the represented adult, and is subject to the obligations and limitations that apply to a trustee. ²²⁸	The attorney for a financial matter must keep their property separate from the principal's property. Maximum penalty 300 penalty units. ²²⁹ This requirement does not apply to property owned jointly by the principal and attorney or property acquired jointly by the principal and attorney in place of property owned jointly by the principal and attorney. ²³⁰
SA	TAS	VIC	WA
No specific reference in legislation.	(3) An attorney under an EPOA must keep any property of the donor (apart from property held by the attorney and donor as tenants in common or joint tenants) separate from property of the attorney (Penalty – fine not exceeding 50 penalty units). ²³¹	An attorney under an EPOA must keep the attorney's property separate from the principal's property (unless owned jointly by the principal and attorney). ²³²	No specific reference in legislation.

²²⁶ Powers of Attorney Act 2006 (ACT) s 48.

²²⁷ Powers of Attorney Regulations 2016 (NSW) Prescribed Form sch 2 cl 6.

²²⁸ Advance Personal Planning Act (NT) s 31.

²²⁹ Powers of Attorney Act 1998 (Qld) s 86.

²³⁰ Ibid s 86(2).

²³¹ Powers of Attorney Act 2000 (Tas) s 32(3).

²³² Powers of Attorney Act 2014 (Vic) s 69.

Table 14 - Revocation

ACT	NSW	NT	QLD
<p>An attorney may resign the appointment.²³³ Must take all reasonable steps to tell all attorneys affected by the revocation.²³⁴</p> <p>A power of attorney may be revoked by:</p> <ul style="list-style-type: none"> - the terms of POA²³⁵ - marriage, civil union or civil partnership after the POA is made, unless stated otherwise in the POA²³⁶ - the end of a marriage, civil union or civil partnership with the attorney²³⁷ - death of the principal²³⁸ - death of an attorney²³⁹ - the attorney becomes bankrupt or personally insolvent – revoked in relation to property matters²⁴⁰ - if the attorney is a corporation, the attorney has been or is being wound 	<p>There is a vacancy in the office of an attorney if:</p> <ol style="list-style-type: none"> (a) The appointment is revoked (b) The attorney renounces the power (c) The attorney dies (d) The attorney becomes bankrupt (e) The corporation is dissolved (f) The attorney, by reason of any physical or mental incapacity, ceases to have the capacity to continue to act (g) As prescribed by regulations²⁴⁵ 	<p>An advance personal plan remains in force until</p> <ul style="list-style-type: none"> - The advance personal plan is expressed to be for a limited period – that period ends - The advance personal plan is revoked by the adult who made it - The person/people appointed cease to be decision makers under section 19 - The adult who made the advance personal plan dies.²⁴⁶ <p>An adult who has made an advance personal plan may amend or revoke it at any time if he or she has planning capacity.²⁴⁷ (Section 4 An adult has planning capacity if the adult: (a) has DMC for making an advance personal plan; and (b) does not have an adult</p>	<p>Revocation by principal</p> <ul style="list-style-type: none"> - A principal can revoke the power in writing if he or she has the capacity necessary to make an EPOA giving the same power (see s49 for formal requirements)²⁴⁹ - A principal's POA is revoked, to the extent of an inconsistency, by a later EPOA of the principal²⁵⁰ - Death of the principal²⁵¹ <p>A principal must take all reasonable steps to advise all attorneys of the revocation or if it is registered under the <i>Land Titles Act 1994</i> (Qld) – to deregister it²⁵²</p> <p>Automatic revocation</p> <ul style="list-style-type: none"> - Marriage automatically revokes an EPOA, however an appointor can state in the EPOA that they want the arrangement to continue if they marry. (s.52 – unless there is a

²³³ Powers of Attorney Act 2006 (ACT) s 53.

²³⁴ Ibid s 55.

²³⁵ Ibid s 56.

²³⁶ Ibid s 58.

²³⁷ Ibid s 59.

²³⁸ Ibid s 60.

²³⁹ Ibid s 61.

²⁴⁰ Ibid s 62.

<p>up, or a liquidator is appointed for the attorney²⁴¹</p> <ul style="list-style-type: none"> - the attorney's impaired decision making capacity²⁴² - by later power of attorney to the extent of any inconsistency²⁴³ <p>Effect of revocation on joint powers</p> <ul style="list-style-type: none"> - If the principal has impaired decision making capacity, and there is 1 remaining attorney in relation to the matter, the remaining attorney may exercise power - If there are 2 or more remaining, the remaining attorneys may exercise power in relation to the matter together.²⁴⁴ 		<p>guardian.)</p> <p>Section 19 – the appointment of decision maker ceases when:</p> <ul style="list-style-type: none"> - The decision maker dies - The decision maker resigns - The appointment was for a limited period and that period ends - The advance personal plan by which the person was appointed ceases to be in force or is amended so as to terminate the person's appointment - If a person resigns, must give a copy to each other agent²⁴⁸ 	<p>contrary intention expressed in the enduring document, if a principal marries after making an enduring document, the enduring document is revoked to the extent it gives power to someone other than the principal's husband or wife).²⁵³</p> <ul style="list-style-type: none"> - As above if the principal enters into a civil partnership.²⁵⁴ - If a principal divorces after making an EPOA, the enduring document is revoked to the extent it gives power to the divorced spouse.²⁵⁵ - As above for a civil partnership which is terminated after the making of the EPOA.²⁵⁶ - An enduring document is revoked according to its terms.²⁵⁷ <p>Revocation by attorney</p> <ul style="list-style-type: none"> - If an attorney resigns as attorney for
---	--	---	---

²⁴⁵ *Powers of Attorney Act 2003* (NSW) s 5.

²⁴⁶ *Advance Personal Planning Act* (NT) s 11(b).

²⁴⁷ *Ibid* s 12(1).

²⁴⁹ *Powers of Attorney Act 1998* (Qld) s 47.

²⁵⁰ *Ibid* s 50.

²⁵¹ *Ibid* s 51.

²⁵² *Ibid* s 46.

²⁴¹ *Powers of Attorney Act 2006* (ACT) s 64.

²⁴² *Ibid* s 63.

²⁴³ *Ibid* s 69.

²⁴⁴ *Ibid* s 67.

²⁴⁸ *Advance Personal Planning Act* (NT) s 19.

²⁵³ *Powers of Attorney Act 1998* (Qld) s 52.

²⁵⁴ *Ibid* s 52A.

²⁵⁵ *Ibid* s 53.

²⁵⁶ *Ibid* s 53A.

²⁵⁷ *Ibid* s 54.

			<p>a matter, the enduring document is revoked to the extent it gives power to the attorney for the matter.²⁵⁸</p> <ul style="list-style-type: none"> - Impaired capacity of the attorney²⁵⁹ - Bankruptcy or insolvency of the attorney²⁶⁰ - Death of the attorney²⁶¹ - Attorney becomes a paid carer or health provider²⁶² - Attorney becomes a service provider²⁶³ <p>Effect of power ending – joint attorneys</p> <ul style="list-style-type: none"> - If there is 1 remaining attorney, the remaining attorney may exercise power for the matter - If there are 2 or more remaining attorneys, the remaining attorneys may exercise power for the matter and, if exercising power, must exercise power jointly.²⁶⁴
SA	TAS	VIC	WA
Donee cannot renounce power during period of legal incapacity of the donor	If notice of revocation by the donor is	An EPOA is revoked according to its	No specific reference in the legislation –

²⁵⁸ Ibid s 55.

²⁵⁹ Ibid s 56.

²⁶⁰ Ibid s 57.

²⁶¹ Ibid s 58.

²⁶² Ibid s 59.

²⁶³ Ibid s 59AA.

²⁶⁴ Ibid s 59A.

<p>except with the permission of the Supreme Court.²⁶⁵</p> <p>Supreme Court has power to revoke or vary the terms of an enduring power of attorney, or appoint a substitute donee.²⁶⁶</p>	<p>given to the attorney.</p> <p>If the donor dies, or becomes bankrupt or insolvent.</p> <p>If the donor gives power to someone who is a spouse²⁶⁷, or a personal relationship, when this section ceases to apply to the person (in which case the attorney is to notify the attorney as soon as practicable).</p> <p>A revocation is to be registered.²⁶⁸</p> <p>An EPOA is revoked if the attorney is</p> <ul style="list-style-type: none"> - The only attorney with power or - The attorney is appointed jointly and <p>the attorney dies, becomes subject to mental incapacity or becomes bankrupt or insolvent.</p> <p>If the POA is not registered, and the attorney cannot be found or it is impractical to give the attorney notice of revocation, the POA may be revoked by lodging a notice of revocation, with a copy of the POA.²⁶⁹</p>	<p>terms.²⁷¹</p> <p>The principal may revoke an EPOA or the appointment of an attorney or alternative attorney under the EPOA if the principal has DMC in relation to making an EPOA giving the same power.²⁷²</p> <p><i>Notification – The principal must take reasonable steps to inform any attorneys or alternative attorneys that the appointment of an attorney, or the EPOA has been revoked.</i>²⁷³</p> <p>Other revocation</p> <ul style="list-style-type: none"> - Death of principal²⁷⁴ - Death of attorney²⁷⁵ - Attorney does not have DMC²⁷⁶ - Attorney becomes insolvent under administration²⁷⁷ - Attorney becomes a care worker, health provider or accommodation provider for the principal²⁷⁸ - The attorney is convicted or found guilty of an offence involving dishonesty²⁷⁹ 	<p>can be revoked by Deed²⁸⁵</p> <p>Recommendation 2 of the Statutory Review of the Guardianship and Administration Act 1990 – a person who makes an EPOA can revoke upon completion of a form that should be included in the Regulations. The person revoking any of the powers should have their signature witnessed by an authorised witness and the revocation will not be in effect until the person(s) appointed are notified.</p> <p>Recommendation 4 – Information is provided on the OPA website that a person creating an enduring power of attorney should note the effects of any future marriage, divorce and remarriage in relation to their nominated donee or donees.²⁸⁶ This recommendation was implemented in December 2017, with the Frequently Asked Questions section under EPAs and EPGs updated on the OPA website to include this information.²⁸⁷</p>
---	--	--	--

²⁶⁵ Powers of Attorney and Agency Act 1984 (SA) s 9.

²⁶⁶ Ibid s 11.

²⁶⁷ See also Qld s.53 Powers of Attorney Act 1998 (Qld) – Qld provides for the donor to specify otherwise in the EPOA s52.

²⁶⁸ Powers of Attorney Act 2000 (Tas) s 17(1).

²⁶⁹ Ibid s 32AE.

²⁷¹ Powers of Attorney Act 2014 (Vic) s 43(1).

²⁷² Ibid s 44.

²⁷³ Ibid s 50.

²⁷⁴ Ibid s 51.

	<p>Person dealing with attorney in good faith is not affected by the revocation</p> <p>If an EPOA has been revoked (or suspended by the Board), a person dealing with the attorney in good faith, without notice of the revocation is not affected by the revocation. However, not if notice of the revocation has been given to the Recorder.²⁷⁰</p>	<p>- Trustee company is wound up or cases to be registered.²⁸⁰</p> <p><i>Notification in certain circumstances must be given to the principal (if has DMC for the matter), any other attorney, any alternative attorney and if the principal does not have DMC, the nearest relative of the principal or, if the attorney is not able to notify the nearest relative, the Public Advocate.²⁸¹</i></p> <p>Later inconsistent EPOA - An EPOA is revoked by a later EPOA of the principal so far as the later EPOA is inconsistent.²⁸²</p> <p>An attorney or alternative attorney under and EPOA who has power for a matter may resign as attorney or alternative attorney for that matter at any time when the principal has DMC²⁸³ or when the principal does not have DMC²⁸⁴.</p>	
--	--	--	--

²⁷⁵ Ibid s 52.

²⁷⁶ Ibid s 53.

²⁷⁷ Ibid s 54(1)(a).

²⁷⁸ Ibid s 54(1)(b).

²⁷⁹ Ibid s 54(1)(c).

²⁸⁵ Department of Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*, (2015) 3

<www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/.../tp-3697.pdf>

²⁸⁶ Ibid.

²⁸⁷ Office of the Public Advocate, *Enduring Power of Attorney frequently asked questions*,

<https://www.publicadvocate.wa.gov.au/E/enduring_power_of_attorney_frequently_asked_questions.aspx?uid=7345-1823-2997-6522>

²⁷⁰ *Powers of Attorney Act 2000* (Tas) s 32AG.

²⁸⁰ *Powers of Attorney Act 2014* (Vic) s 54(2).

²⁸¹ Ibid s 54(3) & (4).

²⁸² Ibid s 55.

²⁸³ Ibid s 56.

²⁸⁴ Ibid s 59.

Table 15 - Offences / penalties

ACT	NSW	NT	QLD
<p>A person must not dishonestly induce someone else to make or revoke a power of attorney. Maximum penalty: 100 penalty units, imprisonment for 1 year or both.²⁸⁸</p>	<p>A person must not give a false certificate (certified copy of EPOA) knowing the certificate to be false. Maximum penalty: 5 years imprisonment.²⁸⁹</p> <p>An attorney under a POA that is terminated or suspended must not do any act or thing under the POA if the attorney knows of the termination at the time the attorney does the act or thing. Maximum penalty: 5 years imprisonment.²⁹⁰</p>	<p>s.76(1) Falsely representing to be, or that another person is, a decision maker. Maximum penalty: 200 penalty units of imprisonment for 2 years²⁹¹</p> <p>s.76(2), as above but with the intention of obtaining a benefit for the person or another person.²⁹² Maximum penalty: imprisonment for 7 years</p> <p>s.77 Improper inducement to make, amend or revoke an advance personal plan. Maximum penalty: Imprisonment for 7 years</p> <p>s.78(1) & (2) Improper exercise of authority by decision maker (reckless conduct resulting in contravention, reckless in that the adult did not have impaired DM ability). Maximum penalty: 5 years imprisonment.²⁹³</p> <p>The same conduct, and also if the decision maker engaged in the conduct purportedly in the exercise of the decision maker's authority, but with the</p>	<p>The attorney for a financial matter must keep their property separate from the principal's property. Maximum penalty 300 penalty units³⁰⁰</p> <p>A person must not dishonestly induce a person to make or revoke a power of attorney. Maximum penalty—200 penalty units.³⁰¹</p> <p>A person must not dishonestly induce a person to make or revoke an enduring power of attorney. Maximum penalty—200 penalty units.³⁰²</p> <p>An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests. Maximum penalty—200 penalty units.³⁰³</p> <p>An attorney, who knows a power given to the attorney has been revoked, must not exercise, or purport to exercise, the power. Maximum penalty—200 penalty units.³⁰⁴</p>

²⁸⁸ *Powers of Attorney Act 2006* (ACT) s 90.

²⁸⁹ *Powers of Attorney Act 2003* (NSW) s 44(5).

²⁹⁰ *Ibid* s 49.

²⁹¹ *Advance Personal Planning Act* (NT) s 76(1).

²⁹² *Ibid* s 76(2).

²⁹³ *Ibid* s 78(1) & (2).

		<p>intention of obtaining a benefit for the decision maker or another person. Maximum penalty: 7 years imprisonment.²⁹⁴</p> <p>s.79(1) Inducing decision maker to exercise authority improperly. Maximum penalty: Imprisonment for 5 years.²⁹⁵</p> <p>s.79(2) The person engages in that conduct with the intention of obtaining a benefit for the person or another person. Maximum penalty: Imprisonment for 7 years.²⁹⁶</p> <p>s.80(1) Misleading information to an Agency officer. Maximum penalty: 400 penalty units or imprisonment for 2 years.²⁹⁷</p> <p>s.80(2) A document containing misleading information and the person has knowledge of that circumstance. Maximum penalty: 400 penalty unit or imprisonment for 2 years.²⁹⁸</p> <p>s.83 Payment of compensation to represented adult if the offender is found</p>	<p>An attorney, including a statutory health attorney, must not use confidential information gained because of being an attorney, or because of an opportunity given by being an attorney, other than as provided under section 74, unless the person has a reasonable excuse. Maximum penalty—200 penalty units.³⁰⁵</p>
--	--	---	---

³⁰⁰ *Powers of Attorney Act 1998* (Qld) s 86.

³⁰¹ *Ibid* s 26.

³⁰² *Ibid* s 61.

³⁰³ *Ibid* s 66.

³⁰⁴ *Ibid* s 71.

²⁹⁴ *Advance Personal Planning Act* (NT) s 78(3) & (4).

²⁹⁵ *Ibid* s 79(1).

²⁹⁶ *Ibid* s 79(2).

²⁹⁷ *Ibid* s 80(1).

²⁹⁸ *Ibid* s 80(2).

		guilty of an offence against any of sections 76 to 79. ²⁹⁹	
SA	TAS	VIC	WA
<p>Offence if donee of enduring power fails to keep and preserve accounts of dealing and transactions made in pursuance of the power – liable to a penalty (recoverable summarily) of an amount not exceeding \$1,000.³⁰⁶</p>	<p>An attorney under an EPOA must keep an accurate record of all dealings and transactions made as the attorney. (Fine not exceeding 20 penalty units)³⁰⁷</p> <p>(3) An attorney under an EPOA must keep any property of the donor (apart from property held by the attorney and donor as tenants in common or joint tenants) separate from property of the attorney (Penalty – fine not exceeding 50 penalty units).³⁰⁸</p> <p>(3) An attorney under an EPOA must keep any property of the donor (apart from property held by the attorney and donor as tenants in common or joint tenants) separate from property of the attorney (Penalty – fine not exceeding 50 penalty units).³⁰⁹</p> <p>Not an offences to induce someone to make or revoke an instrument.³¹⁰</p>	<p>A person must not dishonestly obtain an EPOA, obtain a revocation of an EPOA or dishonestly use an EPOA to obtain financial advantage for the person or another person, or cause loss to the principal or another person.³¹²</p> <p>If a body corporate commits an offence against s135(1)-(3), an officer of the body corporate also commits an offence against the provision if the officer failed to exercise due diligence to prevent the commission of the offence by the body corporate.³¹³</p>	<p>Shall keep and preserve accurate records and accounts of all dealings and transactions made under the power.³¹⁴ Penalty applicable - \$2,000</p> <p>Statutory Review – Recommendation 64 – That the Act is amended to increase the penalty for a donee who fails to act properly under section 107 from the current \$2,000 to \$5,000³¹⁵</p>

³⁰⁵ Powers of Attorney Act 1998 (Qld) s 74A.

²⁹⁹ *Advance Personal Planning Act* (NT) s 83.

³⁰⁶ *Powers of Attorney and Agency Act 1984* (SA) s 8.

³⁰⁷ *Powers of Attorney Act 2000* (Tas) s 32AD.

³⁰⁸ *Ibid* s 32(3).

³⁰⁹ *Ibid* s 32(1)-(3).

³¹⁰ Tasmania Law Reform Institute, *Review of the Guardianship & Administration Act 1995 (Tas)*, Issues Paper No.25, (November 2017), xvi.

³¹² *Powers of Attorney Act 2014* (Vic) s 135.

	<p>Third parties</p> <p>(1) The attorney under an EPOA has, if the donor has become subject to a mental incapacity, a right to –</p> <p>(a) all the information to which the donor is entitled and</p> <p>(b) all the information to which the donor would have been entitled but for the mental incapacity –</p> <p>if the information is reasonable required for the purpose of exercising a power under, or determining whether to exercise a power under, the enduring power of attorney.</p> <p>(2) Will</p> <p>(3) A person who has custody or control of information or a will to which an attorney under an EPOA has a right under ss (1) and (2) must, at the request of the attorney, disclose to the attorney the information, or provide to the attorney a copy of the will that is certified by the person (penalty – fine not exceeding 2 penalty units)³¹¹</p>		
--	--	--	--

³¹³ Powers of Attorney Act 2014 (Vic) s 137.

³¹⁴ Guardianship and Administration Act 1990 (WA) s 107(1)(b).

³¹⁵ Western Australian Department of the Attorney General, *Statutory Review of the Guardianship and Administration Act 1990* (2015) 33.

<www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/.../tp-3697.pdf>

³¹¹ Powers of Attorney Act 2000 (Tas) s 32AA.

Table 16 - Compensation

ACT	NSW	NT	QLD
<p>An attorney may be ordered by the Supreme Court to compensate the principal (or the principal's estate) for a loss caused by the attorney's failure to comply with the Act. (Note- under s52 the attorney may be relieved from liability).³¹⁶</p>	<p>The Supreme Court or the Tribunal may consider applications for a 'financial management order' under the <i>Powers of Attorney Act</i> ³¹⁷(although this does not establish an avenue for compensatory relief per se).</p>	<p>Criminal compensation s.83 Payment of compensation to represented adult if the offender is found guilty of an offence against any of sections 76 to 79.³¹⁸</p>	<p>Compensation, along with other remedies under the <i>Powers of Attorney Act 1998</i> (Qld) or under the general law, are available to an adult who suffers loss as a result of an attorney's failure to comply with their duties and obligations.</p> <p>The Supreme Court has jurisdiction to order an attorney or former attorney to compensate a principal in certain circumstances. QCAT has held that it does not have jurisdiction to award compensation against a former attorney where the enduring power of attorney has been revoked.³¹⁹</p> <p>The <i>Queensland Guardianship and Administration and Other Legislation Amendment Bill 2018</i> (Qld) (Bill) clarifies that QCAT and the Supreme Court are conferred jurisdiction to order compensation, including where the attorney's appointment has ended or the principal has died.³²⁰</p> <p>The Bill includes a new remedy that provides that the Supreme Court or</p>

³¹⁶ *Powers of Attorney Act 2006* (ACT) s 50.

³¹⁷ *Powers of Attorney Act 2003* (NSW) s 37.

³¹⁸ *Advance Personal Planning Act* (NT) s 83.

³¹⁹ *LPJ* [2011] QCAT 177; *The Public Trustee of Queensland v BN and Ors* [2011] QCAT 666.

³²⁰ *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld), cl 74.

			<p>QCAT may order an attorney to account for any profit the attorney has accrued as a result of the attorney's failure to comply with the <i>Powers of Attorney Act 1998</i> in the exercise of a power.</p> <p>s.106 Compensation for failure to comply</p> <p>(1) an attorney may be ordered by a court³²¹ to compensate the principal (or principal's estate) for a loss caused by the attorney's failure to comply with the Act in the exercise of a power</p> <p>(2) Subsection (1) applies even if the attorney is convicted of an offence in relation to the attorney's failure</p> <p>(3) if the principal has died, the application must be made within 6 months of death</p> <p>(4) if principal and attorney have both died, application must be made within 6 months of the first death</p> <p>(5) a court may extend the application time</p> <p>(6) compensation paid under a court order must be taken into account in assessing damages in a later civil proceeding in relation to the attorney's exercise of the power.³²²</p> <p>Clause 74 of the <i>Guardianship and Administration Bill 2018</i> (Qld) inserts a new s.106 which enables QCAT or the</p>
--	--	--	--

³²¹ See section 109A – the tribunal is given the same jurisdiction and powers for enduring documents (*that have not ended*) as the Supreme Court

³²² *Powers of Attorney Act 1998* (Qld) s 106.

			<p>court to order an account of profits against an attorney, administrator or guardian.</p> <p><i>New s.106 Compensation and accounting for profits for failure to comply:</i></p> <p><i>(1) The court or tribunal may order an attorney for a principal to pay an amount to the principal or, if the principal has died, the principal's estate</i></p> <p><i>(a) to compensate for a loss caused by the attorney's failure to comply with this Act in the exercise of a power; or</i></p> <p><i>(b) to account for any profit the attorney has accrued as a result of the attorney's failure to comply with this Act in the exercise of a power.</i></p> <p><i>(2) However, the court or tribunal may not order the attorney to make a payment under both subsection (1)(a) and (b) in relation to the same exercise of power.³²³</i></p> <p>The Queensland Criminal Code contains a range of offence provisions for fraudulent acts which criminalise dishonestly obtaining advantage or benefit, pecuniary or otherwise from another person and theft. Queensland Courts may order restitution or compensation to victims of these crimes in certain circumstances.</p>
--	--	--	--

³²³ *Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld) cl 74.*

SA	TAS	VIC	WA
<p>The donee must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, shall be liable to compensate the donor for loss occasioned by the failure.³²⁴</p> <p>Recovery under section 7 would require recovery action to be commenced by the donor in court.</p> <p>Section 11A provides scope for action in the Supreme Court where a donor has passed away and it appears that the donee of the enduring power has taken actions which have impacted the share of a beneficiary under a will.</p>	<p>An attorney under an EOA, during any period of mental incapacity of the donor –</p> <p>(a) is taken to be a trustee of the <u>property and affairs</u> of the donor according to the tenor of the power; and</p> <p>(b) must exercise his or her powers as attorney to <u>protect the interests</u> of the donor-</p> <p>and if he or she fails to do so, is liable to compensate the donor for any loss occasioned by the failure.³²⁵</p> <p>If an attorney is charged with and convicted of criminal offences, for example fraudulent dealing with trust property, the court can make compensation orders against the attorney.</p>	<p>The Supreme Court or VCAT may order an attorney under an EPOA to compensate the principal for a loss caused by the attorney contravening any provision of the POA Act relating to EPOAs when acting as an attorney.</p> <p>This applies even if the attorney is convicted of an offence in relation to the contravention, the principal has died, the EPOA is invalid or has been revoked or at the time of the contravention was invalid or had been revoked.³²⁶</p> <p>s.78 who can apply</p> <p>s.79 Time limits - wn 6 months of death of principal or attorney</p> <p>See <i>LSI (Guardianship)</i> [2018] VCAT 373 (13 March 2018)</p>	<p>The donee shall exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, he is liable to the donor for any loss occasioned by the failure.³²⁷</p>

³²⁴ Powers of Attorney and Agency Act 1984 (SA) s 7.

³²⁵ Powers of Attorney Act 2000 (Tas) s 32(1).

³²⁶ Powers of Attorney Act 2014 (Vic) s 77.

³²⁷ Guardianship and Administration Act 1990 (WA) s 107.

Table 17 - Tribunal powers

ACT	NSW	NT	QLD
<p>The <i>Guardianship and Management of Property Act 1991</i>, pt3 deals with proceedings in relation to enduring powers of attorney by the ACAT.³²⁸ ACAT can conduct a review on application, and revoke/suspend enduring powers of attorney. ACAT may refer an application to the Supreme Court.³²⁹</p> <p>The Supreme Court has the power to confirm powers understood by a principal and subsequently affirmed by a principal.³³⁰</p> <p>An attorney may be ordered by the Supreme Court to compensate the principal (or the principal's estate) for a loss caused by the attorney's failure to comply with the Act but the Tribunal does not have this jurisdiction. (<i>Note-under s52 the attorney may be relieved from liability</i>).³³¹</p>	<p>The Guardianship Tribunal and Supreme Court are review tribunals.³³²</p> <p>The Supreme Court can make orders confirming powers conferred when principal mentally incapacitated³³³</p> <p>Both the Guardianship Tribunal and Supreme Court have jurisdiction to review enduring powers of attorney³³⁴</p> <p>A review tribunal may make orders relating to the making of an EPOA, the operation and effect of the power or provide advice or directions³³⁵</p> <p>The Guardianship Tribunal may refer questions of law to the Supreme Court</p> <p>Appeals from decisions of the Guardianship Tribunal may be made to the Supreme Court³³⁶ or to the Administrative Decisions Tribunal³³⁷</p>	<p>The jurisdiction suggested by the ALRC does not exist.</p> <p>The Northern Territory Civil and Administrative Tribunal has various regulatory powers over advance personal plans – can cancel them, make changes – see Part 5 <i>Advance Personal Planning Act</i> (NT)</p> <p>The Tribunal may make:</p> <ul style="list-style-type: none"> - Declarations as to validity, status, powers etc³³⁸ - Orders to decision makers³³⁹ - Orders to former decision makers³⁴⁰ - Amend or revoke an advance personal plan³⁴¹ - Endorse cessation of decision matter³⁴² 	<p>Both QCAT and the court have jurisdiction to order an attorney or former attorney to compensate a principal in certain circumstances (see Table 16).</p> <p>The Tribunal is given the same jurisdiction and power for enduring documents as the Supreme Court.³⁴⁴</p> <p>The court's powers include:</p> <ul style="list-style-type: none"> - Making a determination about capacity³⁴⁵ - A declaration about whether a person had capacity to enter a contract³⁴⁶ - Declaration about validity³⁴⁷ - Declaration about commencement of power³⁴⁸

³²⁸ *Power of Attorney Act 20016* (ACT) Chapter 7; *Guardianship and Management of Property Act 1991* (ACT) Pt 3.

³²⁹ *Guardianship and Management of Property Act 1991* (ACT) s 63.

³³⁰ *Powers of Attorney Act 2006* (ACT) s 80 - 82.

³³¹ *Ibid* s 50.

³³² *Powers of Attorney Act 2003* (NSW) s 26.

³³³ *Ibid* Division 3.

³³⁴ *Ibid* Division 4, s 33.

³³⁵ *Ibid* Division 4 s 33-38.

³³⁶ *Ibid* s 40.

		- Consent decision ³⁴³	<ul style="list-style-type: none"> - Order removing or changing or revoking a document³⁴⁹ - Advice, directions and recommendations³⁵⁰ - Require records and audit³⁵¹
SA	TAS	VIC	WA
The South Australian Civil and Administrative Tribunal does not have jurisdiction in relation to powers of attorney.	<p>Section 33</p> <p>The Board may of its own motion or on application by an attorney, by or on behalf of a donor, or an application by any other person who the Board believes has a proper interest in the matter, hold a hearing (Div 1 of Part 10 of the Guardianship and Administration Act 1995) to review an EPOA.</p> <p>The Board may vary, appoint a substitute attorney, declare the donor did</p>	<p>S.77 – compensation</p> <p>The Supreme Court or VCAT may order an attorney under an EPOA to compensate the principal for a loss caused by the attorney.³⁵⁶</p> <p>Part 8 <i>Powers of Attorney Act</i> 2014 (Vic)</p> <p>VCAT jurisdiction – VCAT can make an order about any one or more of the</p>	<p>The State Administrative Tribunal requires an application under section 109 to intervene in the operation of an enduring power of attorney. Under section 109(1), a person who has a proper interest in the matter may apply to the Tribunal to:</p> <ul style="list-style-type: none"> - require the donee of an EPOA to file with the Tribunal a copy of all records and accounts of dealings and transactions made

³³⁷ *Powers of Attorney Act 2003* (NSW) s 41.

³³⁸ *Advance Personal Planning Act* (NT) s 58.

³³⁹ *Ibid* s 59.

³⁴⁰ *Ibid* s 60.

³⁴¹ *Ibid* s 61.

³⁴² *Ibid* s 62.

³⁴⁴ *Powers of Attorney Act 1998* (Qld) s 109A.

³⁴⁵ *Ibid* s 111.

³⁴⁶ *Ibid* s 112.

³⁴⁷ *Ibid* s 113.

³⁴⁸ *Ibid* s 115.

³⁴³ *Advance Personal Planning Act* (NT) s 63 & 64.

³⁴⁹ *Powers of Attorney Act 1998* (Qld) s 116.

³⁵⁰ *Ibid* s 118.

³⁵¹ *Ibid* s 122.

³⁵⁶ *Powers of Attorney Act 2014* (Vic) s 77.

	<p>not did not have mental capacity to make or revoke an EPOA, declare that the EPOA or revocation of it is invalid, revoke the EPOA, make such order as the Board thinks fit.</p> <p>The Board may suspend the EOPA and may appoint the Public Trustee or any other person as a substitute.³⁵²</p> <p>See s34 for the requirements for application.</p> <p>The Board may give advice or directions on application by attorney. The Board may approve or disprove any act proposed to be done by the attorney, give such advice or direction as it considers appropriate, vary the effect of the EPOA or may any other order.</p> <p>The Board can of its own motion direct, or offer advice to an attorney in respect of any matter arising under the POA.</p> <p>Without limiting powers, may require attorney to lodge records with the Board, require those records and accounts to be audited, require the attorney to submit a plan of financial management to the Board.</p> <p>An attorney who contravenes a direction under this section is guilty of an offence and is liable on summary conviction to a fine not exceeding 20 penalty points.³⁵³</p>	<p>following:</p> <ul style="list-style-type: none"> - Scope or exercise of the POA - Effect of any failure to comply with execution requirements - The validity of the EPOA - The validity of a transaction - Lodgement of accounts - Examination and auditing of accounts or other document - Giving a report on any examination and audit - Provisions in relation to supportive attorney appointments³⁵⁷ <p>Nature of VCAT orders – VCAT may do any one or more of the following -</p> <ul style="list-style-type: none"> - Revoke all or part of the EPOA - Revoke the appointment of an attorney - Vary the effect of the EPOA - Suspend the EPOA - Authorise or validate a transaction - Make any other order it considers necessary - Do any other thing that VCAT is required or permitted to do under this Act. 	<p>in connection with the EPOA;</p> <ul style="list-style-type: none"> - require records and accounts to be audited and require a copy of the auditor's report be provided to the Tribunal; and - revoke or vary the terms of the EPOA, appointing a substitute donee or confirm that a person appointed to be the substitute donee has become the donee. <p>Under section 109(2), the donee of an EPOA may apply to the Tribunal for:</p> <ul style="list-style-type: none"> - an order revoking or varying the terms of an EPOA, or appointing/confirming the appointment of a substitute donee - for directions as to atters connected with the exercise or construction of the EPOA. <p>Under section 109(3), the State Administrative Tribunal may also, upon application or upon receiving a report of a donee's bankruptcy under section 107(1)(d), make an order under section 109(1) or section 109(2) or make such other order as to the exercise or construction of the EPOA that the Tribunal thinks fit.</p> <p>Under section 108, where the State</p>
--	---	---	---

³⁵² Powers of Attorney Act 2000 (Tas) s 33.

³⁵³ Ibid s 35.

³⁵⁷ Powers of Attorney Act 2014 (Vic) s 116.

	<p>If an application contains a statement that is false or misleading in a material particular, the person making the application is guilty of an offence and is liable on summary conviction to a fine not exceeding 5 penalty units.³⁵⁴</p> <p>Appeal to the Supreme Court on a question of law as of right, or any other question, only with the leave of the Court.³⁵⁵</p>	<ul style="list-style-type: none"> - Before making an order, must be satisfied that the attorney is not complying with provisions of the Act and the principal does not have DMC³⁵⁸ <p>Advisory opinions – the tribunal may give an advisory opinion on any matter relating to an EPOA³⁵⁹</p>	<p>Administrative Tribunal makes an administration order or an order under sections 65 or 66, the Tribunal can revoke or vary the enduring power of attorney, or revoke the order made under section 104A which recognised an enduring power of attorney made in another jurisdiction.</p> <p>The Supreme Court has powers to hear appeals against some decisions concerning EPOAs. Apart from that, the <i>Guardianship and Administration Act 1990</i> does not set out the Supreme Court’s powers concerning EPOAs. It would have some powers, but their exact extent is unclear.</p> <p>Recommendation 66 of the Statutory Review proposes that the State Administrative Tribunal has additional powers to:</p> <ul style="list-style-type: none"> - Temporarily suspend an EPOA where it is subject to review - Declare an EPOA invalid if it has not been properly executed - Declare an EPOA invalid for other reasons, for example, lack of capacity of the donor at the time the power was made - Provide that a copy of such orders are provided to the
--	--	--	---

³⁵⁴ *Powers of Attorney Act 2000* (Tas) s 36.

³⁵⁵ *Ibid* s 40.

³⁵⁸ *Powers of Attorney Act 2014* (Vic) s 120.

³⁵⁹ *Ibid* s 121.

			Registrar of Titles to check if the EPOA is lodged with Landgate and if so, removed from their book relating to section 143(1A0 of the Transfer of Land Act 1983 (WA).
--	--	--	--