Queensland Law Society

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Office of the President

10 April 2026

Our ref: [SS:MC]
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Dr James Popple
Chief Executive Officer
Law Council of Australia
Level 1, MODE3
24 Lonsdale Street
BRADDON ACT 2612

By email: [redacted]

Dear Dr Popple

Delays and lack of consistency in bank practices in relation to enduring powers of attorney and deceased estates

Thank you for the opportunity to provide feedback on delays and lack of consistency in bank practices in relation to enduring powers of attorney and deceased estates. The Queensland Law Society (**QLS**) appreciates the opportunity to provide examples of challenges our members have experienced for you to raise with the Australian Banking Association (**ABA**).

This response has been compiled from feedback from the QLS Succession Law Committee and Elder Law Committee, whose members have substantial expertise in this area. We have provided comments on the general observations in your table of examples and detailed additional issues our members have raised.

General observations

QLS members have experienced many of the concerns outlined in the table of examples you provided. While our members have reported some improvements, many of the issues reported are ongoing.

We have not received specific feedback on all the issues identified in the table. However, our members have regularly reported the following issues:

- Small amounts transferred in relation to closed estates, particularly without a reference that the practitioner can use to identify which estate the funds relate to.
- Inconsistencies in whether a bank will accept correspondence and documents by email and how documents are to be certified.
- Inconsistencies between branch staff and the estates team (and in-house counsel).
- Joint bank accounts being frozen.

- Delays in acknowledging and responding to correspondence or claiming that correspondence has not been received.

Many of the issues raised in your table and by our members are due to differences in bank policies and procedures and inconsistencies in how bank staff interpret those policies, procedures and the underlying laws.

Our members have reported bank tellers appear to use standard checklists that require documents that are not always necessary. This could be due to the use of nationally standard software programs that require bank staff to confirm sighting particular documents despite the different requirements in each State and Territory.

In some cases, our members have had to escalate matters to the banks' in-house lawyers to bypass branch staff members who insist on an incorrect interpretation of the law.

This unnecessarily increases the time spent going back and forth with banks, which causes delays in finalising estates and increases the estate's legal costs.

QLS would strongly support a consistent and unified protocol for all Australian financial institutions when dealing with deceased estates and powers of attorney. However, the protocol will need to take into account the differences between State and Territory laws.

Additionally, education and training of bank staff, including branch tellers, is essential. We recommend training on the differences between the State and Territory deceased estate laws, enduring powers of attorney, capacity and testamentary trusts.

Misunderstanding enduring powers of attorney

QLS members have experienced bank staff preventing principals and their advisors from having any access to the principal's accounts and bank statements after an enduring power of attorney (**EPOA**) has been invoked. This includes branch staff refusing to provide a bank balance to the principal at the branch counter.

Our members have reported that bank staff often erroneously believe that once an EPOA is invoked the attorney takes control of all the principal's finances. However, a principal may have lost capacity for some larger financial decisions but still retain capacity to transact small amounts for their everyday consumables. Alternatively, an EPOA could have been invoked as a temporary measure due to temporary incapacity rather than permanently.

Even if a principal has lost all capacity for financial matters, they are still entitled to information about their circumstances, including details of their bank balance and access to their bank statements. However, many bank staff do not understand the nuances of capacity and simply apply a blanket approach to prevent the principal accessing their account once an EPOA has been invoked. This can lead to misuse or abuse of an EPOA going unchallenged or inadvertently facilitated by bank staff who aren't aware of the attorney's obligations or limits on their powers.

Therefore, more training of bank staff about capacity and EPOAs is urgently needed.

Trust account transfer issues

QLS members have noted banks regularly transfer funds to their trust accounts without an adequate reference to allow the member to identify which matter the funds relate to. Despite our members providing a deposit reference (usually their file number), the banks often do not

use that reference when the deposit is made. Further, a bank's written confirmation of the transfer or final account statement is often received quite some time after the transfer has occurred.

This is an issue with both open and closed estate matters, which makes it difficult to work out which matter the funds relate to and causes delays in receipting the funds to the matter. This is particularly difficult for large legal practices that receive numerous deposits into their trust account daily.

Another issue raised by our members recently is banks requiring solicitors to put their trust account details on letterhead in addition to including those details in the bank's redemption documents for deceased estates. However, if a covering letter is sent with the redemption documents, it seems unnecessary to also require the trust account details in the letter. Alternatively, the bank should include this in their list of requirements to be addressed from the outset of the matter.

Further, our members have noted that banks rarely, if ever, telephone to confirm trust account details to mitigate against email fraud, despite our members requesting they call (as required by the Lexon insurance risk standard). If banks have the ability to verify account details without calling the legal practice, we suggest they notify the legal profession that calling to verify account details is not necessary for transfers made by the banks.

Unreasonable requirements for joint bank accounts

One of our members has experienced an additional issue in relation to joint bank accounts. In this case, the deceased had a joint bank account with their surviving spouse with Commonwealth Bank of Australia (**CBA**) and no other accounts with the bank. CBA required the surviving spouse to provide a copy of the deceased's will before they would take any action in relation to the account even though the account was a joint tenancy asset and should have automatically reverted to the spouse. There was no reason for the bank to require anything other than the death certificate to remove the deceased from the account.

This caused delays as the member had to wait to receive the original will from another firm before they could certify it and provide the certified copy to the bank. This requirement could become even more problematic if a person dies intestate and the bank then refuses to change the account until letters of administration are obtained.

It appears this may be CBA's standard practice, as the bank has a deceased estate form that requires documents such as a certified copy of the will to be provided irrespective of the type of account involved.

Refusal to provide information

One of our members reported that CBA refused to provide information requested about a deceased estate (historic bank statements) despite our member providing a signed direction and authority from the executor. In this scenario, the estate administration had begun with a different law firm who had referred the matter to our member.

Apparently, CBA had recorded the name of the previous law firm as 'the executor', which was why they refused to act on the executor's written authority. Even after this error was cleared up, CBA still refused to act on the executor's authority until they received confirmation from the previous law firm that they were not acting any more.

This interaction suggests the CBA staff member did not adequately understand the process and the powers of the executor.

Difficulties contacting bank staff

QLS members have reported difficulties with speaking to bank staff over the telephone. When our members call, there is often a long wait before they can speak with a staff member. Further, some bank staff are only willing to speak to one designated person from the legal practice and refuse to speak to any other member of the legal team. This becomes even more problematic if that designated person is away or otherwise not available.

Difficulties with password protected documents

One QLS member reported that some banks send correspondence that is password protected, with the password emailed separately. However, sometimes the email with the password either does not come through quicky or at all.

Misunderstanding testamentary trusts

QLS members have reported issues with banks when dealing with testamentary trusts, including:

- National Australia Bank refusing to open a bank account for a testamentary trust without a grant of probate.
- Macquarie Bank refusing to accept that the trustees of a testamentary trust existed because there was no grant of probate.
- CBA requesting to see a testamentary trust as a deed.

Unnecessarily requiring probate

QLS members have reported experiencing issues with banks requiring a grant of representation when it is not necessary.

One of our members reported that RAMS Mortgage management for Westpac required a grant of probate before they would release a mortgage at settlement of a sale of estate property. This was despite the executor of the estate being registered as personal representative on the title to the property. In Queensland, real property can be registered in the personal representative's name without a grant of representation in certain circumstances.[1] Once registered, the personal representative has the same rights, powers and liabilities as if a grant of representation had been made to them, including the right to sell the property.

Despite this, RAMS advised it was a requirement of their policy that probate be obtained to determine that the will was legitimate and the most current document. However, this was not necessary under Queensland law, as Queensland Titles Registry staff had examined the original will to ensure it was in order before registering the executor as personal representative on the title.

RAMS only advised the member of their requirement for a grant of probate on the morning of settlement. Consequently, the sale could not settle on the settlement date. This caused

[1] S 111 *Land Title Act 1994* (Qld).

considerable distress to the executor of the estate and their legal representatives on the morning of settlement and resulted in unnecessary additional costs being incurred.

Other QLS members have experienced similar issues, including with Bankwest.

These incidents suggest that bank staff are applying standard requirements that do not take into account the different law that applies in Queensland. In our view, it is unreasonable for a bank to require probate under the bank's policy when it is not required under Queensland law.

Although we understand this is not a national issue, we would appreciate you raising this issue with the ABA on our behalf or providing us with a contact at the ABA so we can discuss this issue directly with them.

Ongoing feedback

To support your regular dialogue with the ABA, QLS would be happy to provide an update on a regular basis on any improvements our members notice or any additional issues they encounter in their dealings with banks in deceased estates and matters involving EPOAs.

QLS would also welcome the opportunity to provide feedback on a draft protocol for all Australian financial institutions to follow when dealing with deceased estates and EPOAs

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [redacted].

Yours faithfully

[redacted]

Peter Jolly
President