

# DomaCom Equity Release Product

ERP Qualified Adviser



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## DomaCom Equity Release Product

Adviser Accreditation Program

Study Guide Module 5

## Module 5: Client/Adviser Communication and Conduct



**Module 5:**  
Reasoning & Decision-making

**Client/Adviser  
Communication and Conduct**

Financial Capability  
Ethical Conduct

### 5.1 Financial Capability

#### 5.1.1 Human-centred Approach

Behavioural economics provides insights into the way that people make financial decisions.

Acknowledging that poor financial decision-making is widespread and developing a good understanding of the biases that impact rational thinking is critical for all financial advisers but particularly relevant for those advising on retirement funding strategies.

Given that the family home is likely to represent a considerable part of our client's overall personal wealth and that equity release has long-term implications, it should not be surprising that these clients expect their advisers to provide a high duty of care.

Adopting a human-centred approach to guiding ERP clients in these significant transactions requires more than an empathetic client management process. Research clearly demonstrates that poor financial decision-making is not well correlated with wealth, education or social standing and a generally-held wisdom or perception about good practice is not enough to deliver on client expectations and regulatory obligations.

A human-centred approach requires that we develop a sound understanding of the instincts that each of us, as humans, rely on in order to solve problems or make decisions.



[https://youtu.be/RwdNeMD\\_-0c](https://youtu.be/RwdNeMD_-0c)

### 5.1.2 Five Indicative Behaviours

Over time, the advice industry has adopted many approaches to the challenge of understanding and meeting client needs. However, needs often arise as a consequence of behaviour and it is in the understanding of client behaviour that the real challenge for advisers arises.

There are a number of profound outcomes that can be expected from an ERP client's behaviour including; their motivation to release equity, the purpose to which they intend to apply the proceeds, their consideration of long-term implications and their attitude towards the impact on other stakeholders.

Five indicative client behaviours that should be considered:

1. Approach to managing everyday expenses,
2. Attention to planning for the medium and longer term,
3. Assessment and understanding of financial products,
4. Effort to stay informed and willingness to seek guidance, and
5. Savings and debt management behaviour.

Five indicative adviser behaviours that should be considered:

1. Providing services in a manner which protects client interests,
2. Possessing the skills and resources to provide those services,
3. Demonstrating technical competence and procedural efficiency,
4. Only entering into fee agreements that are suitable for the client, and
5. Respecting the capacity, agency and dignity of clients.



**Regulatory Guidance:**

<https://download.asic.gov.au/media/4698465/rg175-published-10-april-2018.pdf>

## 5.2 Reasoning and Decision-making

Behavioural finance extends the psychological analysis beyond basic emotions such as fear and greed to consider the impact of biases in decision-making.

Developing an understanding of the processes that push our clients towards relying on; "rules of thumb", "common sense", "educated-guesses" and "gut feel", should assist us to better understand the common biases in financial decision-making.

Behavioural finance is particularly relevant to changing the behaviour of advisers and improving their client communication. For example, the use of client feedback and a change in the way that information is provided to clients, can improve the quality of advice and client satisfaction with the advice that they receive.

### **5.2.1 Anchoring Bias**

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Anchoring bias is the tendency to rely too heavily on, or anchor to, a past reference or one piece of information when making a decision.

There have been many academic studies undertaken on the power of anchoring on decision making. Studies typically get people to focus on a totally random number, like their year of birth or age, before being asked to assign a value to something.

The studies show that people are influenced in their answer, or anchored, to the random number that they have focused on prior to being asked the question.

### **5.2.2 Restraint Bias**

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Restraint bias is the tendency for people to overestimate their ability to control impulsive behaviour. An inflated self-control belief may lead to greater exposure to temptation, and increased impulsiveness.

Restraint bias causes people to miscalculate the amount of temptation they can really handle, which in turn leads to a greater likelihood of disregarding risk in order to pursue desired outcomes.

### **5.2.3 Information Bias**

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Information bias is the tendency to evaluate information even when it is not relevant in understanding a problem or issue.

The key in investing is to see the 'wood from the trees' and to carefully evaluate information that is relevant to making a more informed decision and to discard (and hopefully ignore) irrelevant information.

Clients are bombarded with useless information every day and it is difficult to filter through it to focus on information that is relevant.

### **5.2.4 Confirmation Bias**

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Confirmation bias is the natural human tendency to seek or emphasise information that confirms an existing conclusion or hypothesis.

Confirmation bias is a major reason for investment mistakes as investors are often overconfident because they keep getting data that appears to confirm the decisions they have made.

This overconfidence can result in a false sense that nothing is likely to go wrong

## 5.3 Ethical Conduct

### 5.3.1 Fiduciary Duty

Fiduciary duty is a legal obligation of one party to act in the best interest of another.

ASIC has proposed to provide updated guidance in Regulatory Guide 175 Licensing: Financial product advisers — Conduct and disclosure ([RG 175](#)).

This will see the introduction of an explicit legislative fiduciary duty on financial advisers requiring them to place their clients' interests ahead of their own.

### 5.3.2 Client Decision

[Seniors Rights Victoria](#) explains that when dealing with a vulnerable elderly person, you must be sure they have the capacity to understand and that any decision to transact money is free and voluntary.

#### Potential Indicators of Capacity

Indicator	Explanation
<b>Understand information</b>	Do they understand key terms? Do they understand the nature and effect of any important documents? Are they able to engage in discussion with you about the information you are providing, about the advantages and disadvantages, about the options?
<b>Retain information</b>	Can they remember all the recent personal, family, and financial matters that are relevant to this decision? Is their rationale for their decision consistent or stable over time?
<b>Believe information</b>	Do they seem to believe or accept the information you have given them, such as the value of assets, options, advantages and disadvantages and possible outcomes? Are they making decisions on the basis of potentially paranoid ideas or false information?
<b>Evaluate, process and weigh up information</b>	Can they demonstrate to you that they have spent some amount of time considering their options or thinking about their decision? Do they seem to be listening and taking time to process new information you are providing them? Does their decision-making seem impulsive, flippant, poorly considered, or easily influenced by you?
<b>Communicate information</b>	Can your client explain in their own words what you have told them? (Rather than just saying 'yes' or 'no' to your questions.) Do their explanations include important and relevant information? Do they ask questions? Have they shown that they are thinking about how your advice applies to them and their personal and financial situation?

### 5.3.3 Undue Influence

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Seniors Rights Victoria explains the doctrine of undue influence refers to a situation where the weaker party is influenced into entering into an agreement.

Undue influence can be 'actual' or 'presumed'. Actual undue influence may arise as a result of physical coercion which prevents the exercise of independent judgment. Certain relationships also create a presumption of undue influence. However, a relationship between an older person and their adult child does not result in an automatic presumption of undue influence.

For undue influence, what needs to be shown is that:

- there was such a strong relationship of trust and confidence that the court should be compelled to presume that the transaction was not the result of the free and independent will of the older person; and
- the transaction was manifestly disadvantageous to the older person.

When identifying whether a case of undue influence could be made out, you should look at things like:

- intelligence, education, character of the older person,
- age, state of health of the older person,
- the older person's previous experience in business and finances, such as selling a house before and whether they manage their business affairs,
- strength of character and personality of the younger person,
- period of closeness of parties and their relationship,
- vulnerability of the older person in relation to the younger family member,
- opportunity of the younger person to influence the older person,
- whether the older person received independent legal advice.

If your client initially obtained independent legal advice about the nature and effect of the transaction, then the presumption can usually be rebutted. (This underlines the importance of fully and properly advising your client at the outset.)

If you believe your client is acting under the influence of another but insists that you act on their instructions, contact the law institute in your jurisdiction.

### 5.3.4 Unconscionable Conduct

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The ACCC explains that unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience. Under the Australian Consumer Law, businesses must not engage in unconscionable conduct, when dealing with other businesses or their customers.

Unconscionable conduct does not have a precise legal definition as it is a concept that has been developed on a case-by-case basis by courts over time. Nevertheless, unconscionable conduct is generally accepted to mean conduct which should not be done in good conscience.

Unconscionable conduct is more than simply unfair or harsh – it must have an element of bad conscience.

Business behaviour may be deemed unconscionable if it is particularly harsh or oppressive and is beyond hard commercial bargaining.

For example, Australian courts have found transactions or dealings to be 'unconscionable' when they are deliberate, involve serious misconduct or involve conduct which is clearly unfair and unreasonable.

### **Determining whether conduct is unconscionable**

There are a number of factors a court will consider when assessing whether conduct in relation to the selling or supplying of goods and services to a customer, or to the supplying or acquiring of goods or services to or from a business, is unconscionable.

These include:

- the relative bargaining strength of the parties
- whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party
- whether the weaker party could understand the documentation used
- the use of undue influence, pressure or unfair tactics by the stronger party
- the requirements of applicable industry codes
- the willingness of the stronger party to negotiate
- the extent to which the parties acted in good faith.

This is not an exhaustive list and it should be noted that the court may also consider any other factor it thinks relevant.

### **How to avoid engaging in unconscionable conduct**

The following practical tips may assist businesses to avoid engaging in unconscionable conduct:

- do not exploit the other party when negotiating the terms of an agreement or contract
- take care to be reasonable when exercising your rights under a contract
- consider the characteristics and vulnerabilities of your customers. For example, use plain English when dealing with customers from a non-English speaking background
- make sure your contracts are thorough, easy to understand, not too lengthy and do not include harsh, unfair or oppressive terms
- ensure you have clearly disclosed important or unusual terms or conditions of an agreement
- ensure customers understand the terms of any agreement associated with the transaction and give them the opportunity to consider the offer properly. If the contract is long, you may decide to provide a summary of the key terms
- observe any cooling-off periods that may apply or consider offering a cooling-off period
- give customers the opportunity to seek advice about the contract before they sign it
- if things go wrong, be open to resolving complaints
- do not reward your staff for unfair, pressure-based selling.

## Penalties and remedies

If the court determines that unconscionable conduct has occurred, a variety of remedies may be ordered including:

- compensation for loss or damage
- financial penalties
- having the contract declared void in whole or in part
- having the contract or arrangement varied
- a refund or performance of specified services.

### 5.3.5 Elder Law Principles

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Source: <http://www.elderlaw.com.au>

#### Who is an elder?

An elder is a person whose experience of life provides them with the authority to command respect from others or to whom others defer for that reason.

#### What is elder law?

Elder Law is about examining law relevant to an aging community. The decline in the financial capacity of an ageing population is an emerging problem for financial planners. Identification of reduced financial capacity is of particular importance for financial planners if they are to provide appropriate financial advice to this demographic.

#### What are the key principles of elder law?

Under the law, you must presume that every adult has “capacity” and is entitled to their “individual agency”.

Generally, when a person has capacity to make a particular decision they can:

- understand the facts and the choices involved
- weigh up the consequences, and
- communicate the decision.

**Capacity** = Understanding the nature and effect of a document, at the time it is made.

**Individual Agency** = Is when a person acts on his/her own behalf, whereas proxy agency is when an individual acts on behalf of someone else.

Remember, when assessing whether a person has the capacity to make a contract, it is important that you ask open-ended questions. Do not ask leading questions and frame your questions to quickly identify any areas of concern for which a person may need support or help

Assess the person’s decision-making ability – not the decision they make.



[https://www.griffith.edu.au/data/assets/pdf\\_file/0025/205684/FPRJ-V1-ISS1-pp7-21-advising-ageing-clients.pdf](https://www.griffith.edu.au/data/assets/pdf_file/0025/205684/FPRJ-V1-ISS1-pp7-21-advising-ageing-clients.pdf)

### 5.3.6 The Enduring Power of Attorney (Financial)

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An enduring power of attorney (financial) allows a donor to choose someone to make financial and legal decisions on their behalf. 'Enduring' means the power continues even when a donor is unable to make these types of decisions.

#### Capacity

The test for capacity to make an enduring power of attorney (financial) is that a donor understands:

- the powers of the attorney
- when the attorney can exercise these powers
- that a donor can revoke these powers while they have capacity
- that the power will operate if a donor loses the ability to make legal and financial decisions
- that the donor may, in the power of attorney, specify conditions or limitations on, or instruction about, the exercise of the power to be given to the attorney
- once a donor loses capacity, they will not be able to supervise the use of the powers.

#### Formal Requirements

An enduring power of attorney (financial) must be in the approved written form and comply with requirements outlined in Section 123 of the Instruments Act 1958.

These include:

- the enduring power of attorney needs to be signed and dated by two adult witnesses in the presence of the donor and each other
- one witness must be authorised to witness the signing of a statutory declaration
- each witness must sign certificates containing information required by the legislation, including:
  - a statement that the donor signed the enduring power of attorney freely and voluntarily in the presence of the witness
  - the donor had the necessary capacity to understand and sign the enduring power of attorney

- the enduring power of attorney is only effective once the attorney has accepted the appointment

- a statement of acceptance in the appropriate form needs to be signed by the attorney.

The Office of the Public Advocate has published a two- page guide for people appointed with enduring power of attorney (financial), which includes some general information about what the law requires of attorneys.

For example, the law requires that an attorney:

- act in a donor's best interests
- wherever possible, make the same decision that the donor would have made
- keep accurate records of dealings and transactions made under the power
- avoid situations where there is a conflict of interest
- keep the donor's property and money separate from their own.

### 5.3.7 Elder Abuse Prevention

Elder abuse is a complex phenomenon which is not easily classified. Abuse of an older person occurs within a broad range of different relationships and environments. The perpetrator may be a relative, friend or service provider.

Many older people, even while naming and discussing behaviour as abusive, excuse their children. They recognise that their children are living under a great deal of stress and instead place the primary blame on government social and economic policies.

#### Financial Exploitation

Possible elements include:

- destructive family relationships
- greed of family members
- adult children expecting to receive aspects of inheritance on their terms
- reluctance by the older person to contact police when perpetrators are family members
- harm is generally intentional
- the impact is usually psychological harm, though other forms may also be evident (e.g. neglect)

Despite complexities surrounding the issue, research shows that financial abuse is one of the most common types of abuse and is often accompanied by other forms of abuse. Research also shows that women are two or three times more likely to experience elder abuse than men, and sons and daughters are most likely to be responsible for the abuse.

<b>Competence</b>	All adults are considered competent to make informed decisions unless demonstrated otherwise.
<b>Self-determination</b>	With appropriate information and support, individuals should be encouraged to make their own decisions.
<b>Appropriate protection</b>	Where a person is not competent to make their own decisions, it may be necessary to appoint a guardian or administrator. If a person is represented, their wishes should still be taken into account as far as possible.
<b>Best interests</b>	The interests of an older person's safety and wellbeing are paramount. Even when they are unable to make all decisions themselves, their views should be taken into account.
<b>Importance of relationships</b>	All responses to allegations of abuse should be respectful of the existing relationships that are considered important to an older person.
<b>Collaborative responses</b>	Effective prevention and response requires a collaborative approach which recognises the complexity of the issue and the skills and experience of appropriate services.
<b>Community responsibility</b>	The most effective response is achieved when agencies work collaboratively and in partnership with the community.



Elder Abuse Prevention -Online Training:  
<https://elderabuseprevention.kineoportal.com.au>

### 5.3.8 Elder Abuse and the Adviser

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Financial advisers are expected to achieve good outcomes for their clients and when dealing with older clients, this expectation extends beyond financial outcomes to include the client's broader wellbeing. For this reason, it is critical that financial advisers develop a reliable awareness of elder abuse.

Emotional and financial abuse are the most common types of abuse reported in Australia. Emotional abuse can be threats; intimidation, harassment, bullying, pressuring, name calling, treating the person like a child, or threatening to put an older person into an aged care facility.

Financial abuse is the illegal or improper use or management of an older person's money, property or other financial resources and can include incurring bills for which the older person is responsible, forcing the older person to sign a document, abusing power of attorney arrangements, failing to repay a loan, or living with the older person without helping to pay for expenses.

**Risk factors:**

- Low income or socioeconomic status;
- Mental disorders, such as depression;
- Alcohol and drug abuse;
- Social Isolation
- Dependence in terms of needing financial and emotional support.

Note: Elder abuse tends to be intergenerational, that is, involving abuse of parents by adult children and females aged 74 and older are more likely to be victims of elder abuse.



This should be at the forefront of financial advisers' minds when dealing with older clients, and particular vigilance may be required if the client is living with an adult child who holds an enduring power of attorney.

By being aware of the conditions that may place the client at risk, the adviser has the opportunity to prevent elder abuse. Where elder abuse occurs in a family or care giver relationship, the older person may be reluctant to report abuse. Prevention rather than remedy avoids the negative impact of elder abuse on the client, their family relationships and their personal wealth.

#### **Enduring Power of Attorney**

Financial advisers need to be aware of the enduring power of attorney laws in their state or territory when dealing with substitute decision-makers to ensure they are not facilitating elder abuse.

An enduring power of attorney (EPA) is a form of substitute decision-making where a person (referred to as the donor) can appoint another person (the attorney) to make financial decisions for them when they lose their decision-making capacity. Misuse of an EPA is a form of financial abuse. Use of an EPA before the donor loses decision-making capacity or for transactions outside the scope of the EPA or for the benefit of the attorney, can be a misuse of an EPA.

## **Enduring Power of Attorney Law Reform**

Law reform relating to EPA's aimed at preventing elder abuse have recognised a move away from substituted decision-making to supported decision-making which, takes into account the older person's will, preferences and/or rights.

This move reflects the right of an older person to their autonomy by preserving their right to participate in making decisions. The attorney's role is to represent the donor and to give effect to the donor's will and preferences wherever possible.

Substitute decision-making may still be appropriate where the older person's will or preference cannot be ascertained. However, it should be a last resort.

Further, the Australian Law Reform Commission (ALRC) has recommended that legislation should restrict transactions where there is, or may be, a conflict between the interests of the donor and the interests of an attorney.

An attorney would not be permitted to enter into a conflict transaction unless expressly authorised in the EPA or a tribunal authorises the transaction.

The duty to not enter into a transaction where there may be a conflict of interest applies whether there is a statutory restriction or not. Examples of conflict transactions may be the attorney leasing or buying an asset owned by the donor or receiving a gift from the donor.

Recommendations by the ALRC to develop a nationally consistent legal framework and establish a National Register for EPAs was announced as part of the Australian Government's agenda in the 2018/19 Federal Budget.

A national EPA register seeks to reduce elder abuse by:

- ensuring only one EPA is registered at any one time;
- identifying an EPA which is active; and
- clarifying the role and powers of the attorney.

Financial advisers should be familiar with the EPA legislation in their state or territory and keep up-to-date with any developments in these laws.

Where these laws recognise supported decision-making and the right of the older person to participate in making their own decisions, financial advisers should assist EPAs to carry out their duty by considering the Will and preferences of the older person.

Failure to understand the EPA laws can result in financial advisers facilitating misuse of an EPA.



**Further Reading: Power of Attorney**

<https://www.australia.gov.au/information-and-services/family-and-community/wills-and-powers-of-attorney/powers-of-attorney>

### 5.3.8 Putting Your Clients First

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It is important that all financial planners understand their obligations under the best interest duty. It is also important to understand the best interest duty is more than a compliance checklist

*"Acting in the best interest of your client goes beyond a personal belief that you are doing the right thing. It requires documented processes and actions that clearly demonstrate that you have truly acted in the best interest of your client".*

Dante De Gori, CEO -Financial Planning Association of Australia

A client's financial planning needs sit at the heart of both the FPA's Code of Professional Practice and the four elements of the Best Interests Duty.

Under section 945A of the Corporations Act 2001 that require licensees and their advisers to:

- Determine the personal circumstances relevant to the advice being given to the client;
- Make reasonable enquiries in relation to those;
- Having regard to that information, consider and investigate the subject matter of the advice; and
- Ensure that the advice given to the client is appropriate.

Determining whether you are able to meet your client's needs is a critical first step to meeting your professional obligations under the FPA Code and through it, the best interest duty and related obligations in the law.

#### **Client Communication and Documentation**

Identifying and communicating your client's short, medium and long term needs and objectives will allow you to discuss and determine with your client what they would like you to include in your current advice.

In doing this you are also communicating with your client additional needs your client may have but does not want you to include in your current advice.

This demonstrates other steps you have taken in your client's best interest and should be clearly documented in your Statement of Advice.

It will also enable you to clearly show how your advice strategy and recommendations meet your client's goals, objectives and needs over the short, medium and long term. This is vital for demonstrating that you have put your client's needs first.

## Client Needs Matrix



Use the following Client Needs Analysis to help map your client's financial planning needs to the short, medium and long term time horizons. This may be a helpful and clear way to show your client your analysis and understanding of their circumstances, needs and priorities.

Client Needs Analysis			
Needs/Time Horizon	Short Term	Medium Term	Longer Term
Structuring			
Investment			
Estate Planning			
Risk Management			
Debt Management			
Cash Flow			

Source: Content supplied by the FPA publication "Guidance on Best Interest Duty".