

Why is an Enduring Power of Attorney essential?

We all recognise the need for a will when we begin to plan for our future and the future of our loved ones, however many of us do not realise that an Enduring Power of Attorney is just as important to have for during our lifetime. An Enduring Power of Attorney is a legal document that permits another individual to conduct the financial and business affairs for a person when they do not have capacity to make the decisions themselves. It differs from an general Power of Attorney which ceases when you lose capacity.

What is legal capacity?

The person appointed as attorney under an Enduring Power of Attorney can make decisions on your behalf even if you are unable to (ie. lost legal capacity). Legal capacity is a legal term that describes the ability and power under law to make and accept responsibility for important decisions that have legal consequences.

Having the capacity to make decisions simply means that a person can:

- Understand the nature and effect of a decision,
- Freely and voluntarily make those decisions, and
- Communicate the decision in some way.

People can lose capacity for decision making for many reasons, including:

- Intellectual or psychiatric disability
- Injury (eg. motor vehicle injury)
- Dementia, stroke
- Temporary illness

Losing capacity does not just happen to people as they are getting older. A loss of capacity can occur at any age and may be temporary or even permanent.

If there is any doubt about whether a person has legal capacity, we recommend obtaining a written opinion from a qualified medical practitioner.

Why appoint an Enduring Power of Attorney?

By preparing an Enduring Power of Attorney you are reducing the potential stress and expense for your family should you lose mental capacity. Once you lose capacity to make informed financial decisions, you will not be able to operate a bank account, pay bills, sell property, complete your tax return, manage your investments, or deal with any of your financial affairs.

This can become a stressful time for your family as they will not be able to make these decisions for you unless you have appointed an attorney. Where an attorney has not been appointed, they will need to apply to the relevant state tribunal to be appointed as your guardian, which can end up being a potentially expensive and time consuming process.

It is even more important to have an Enduring Power of Attorney if you have an SMSF. This is because a member's attorney can act as trustee of the fund (or director of the corporate trustee) if needed and still comply with the superannuation law requirements.

This also means that if a member departs overseas for an indefinite period of time, a member's attorney can be appointed to act as trustee in their place. This will avoid fund residency issues and allow the fund to continue being treated as a complying Australian resident fund. If an SMSF doesn't meet the trustee requirements or residency requirements then they can be deemed non-complying and face significant tax consequences.

Who should you appoint as your attorney?

Your attorney can have enormous power over your financial and business affairs. Therefore, it is important that you appoint someone who you trust completely and who can manage your affairs in a responsible way. A spouse, adult child, relative or close friend can be the most logical choices when considering who you should appoint as attorney. However, if you have an SMSF it is important to make sure that the person appointed as an attorney is not a disqualified person (as defined by the SIS Act 1993), as otherwise they will not be able to act as trustee on your behalf.

It may be worthwhile appointing more than one attorney to allow for situations where an attorney cannot act on your behalf.

What are the duties and responsibilities of an Attorney?

An attorney has the responsibility to always act in your best interests and must act honestly and make responsible decisions. You can give your attorney the power to make any decision about your finances which you would make under usual circumstances. These can include paying bills, selling a property, accessing cash and making investments (eg. buying or selling shares). In addition to this, should your Enduring Power of Attorney act on your behalf as trustee of your SMSF, they will be subject to the same trustee responsibilities as you were.

An Enduring Power of Attorney must:

- Avoid conflicts between their interests and yours,
- Obey the instructions you make whilst mentally capable and any directions you make in the Enduring Power of Attorney document,
- Keep their finances separate from yours,
- Act according to the limits and conditions placed on their authority,
- Not provide benefits to themselves or others using your finances unless authorised to do so, and
- Keep accurate records of their dealings with your financial and business affairs.

An Enduring Power of Attorney can be revoked or suspended if they act improperly and abuse their position of trust.

When should I appoint an Enduring Power of Attorney?

Like any important document, you should not wait until unforeseen circumstances force you to appoint an Enduring Power of Attorney. It can be very difficult to appoint someone to act on your behalf after you have had a serious accident or lose capacity and so it is important to appoint an attorney when you are healthy, aware and in control.

You can nominate when you want the Enduring Power of Attorney to commence:

- either immediately OR
- only when, you have lost capacity and are incapable of making decisions

Each State has different legislation to deal with the appointment of powers of attorney and this must be followed. For example, some states will require registration of your Enduring Power of Attorney document.

It is essential that the authority is drafted with express authority to act on behalf of your superannuation affairs. It is important to make sure the Enduring Power of Attorney does not have an exclusion clause related to superannuation and/or financial affairs as this will not constitute valid authority for your SMSF.

Of significant importance is the fact that for an SMSF trustee/director of a corporate trustee with an Enduring Power of Attorney the appointment as replacement trustee when capacity is lost, is not automatic. The trustee/director of the corporate trustee needs to be removed and the attorney appointed in their place in accordance with the legislation, trust deed and company constitution (if relevant). The attorney must be appointed to the SMSF within 6 months of the incapacity. Any appointment must be accompanied by a Consent to Act and an ATO Trustee Declaration form. The appointment can be temporary until the individual can act again or may be permanent depending on the loss of capacity. The attorney that takes on this responsibility will have the same powers as the original trustee/director of the corporate trustee.

When does an Enduring Power of Attorney end?

An Enduring Power of Attorney ends when one of the following occurs:

- You revoke the power while you have legal capacity;
- You make a new Enduring Power of Attorney document with a later date;
- You pass away.

Having a valid Enduring Power of Attorney document and having the attorney appointed in accordance with the legislation, trust deed and company constitution (if relevant) when capacity is lost is vital to the SMSF's compliance. As always proper planning will mitigate the risks of not meeting the SMSF's legal requirements and reduce the burden on family members at a potentially difficult time. We recommend members seek appropriate estate planning advice and put arrangements in place.

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