

Why you may need a Power of Attorney for your Company

Most people believe that if they have an Enduring Power of Attorney, it will work for their duties as Director or Secretary of their Company. Unfortunately, this is not the case.

Therefore, you should consider General Powers of Attorney (POA) for Companies which you are involved in because:

- A Company cannot enter into, or make an Enduring Power of Attorney (EPOA)
- A person cannot use their EPOA in their role as Director/Secretary for a Company
- Companies can appoint a General POA in their own right, and in their position as trustee of a trust. (Care should be taken here to ensure that it does not conflict with the powers afforded to Trustees under the Trust Deed).
- A General Power of Attorney will automatically be revoked if the Company is wound up or upon resolution of the Directors.
- Many Companies now have sole Directors primarily to limit liability.
 - There is then an issue if the sole Director becomes temporarily or permanently incapacitated. To avoid any such issues, the Company should use a General Power of Attorney (POA) to appoint a representative to act on the Company's behalf during such periods. The POA can also be used if the Director is travelling. You should also consider the same issues for two director companies; in case both directors are simultaneously incapacitated.

In modern Wills (please check you have a modern Will) testators who are also Directors will generally make an appointment of their Executor/s as replacement Director, trustees and/or Appointors which would then deal with the situation post-death.

However, a General POA can also be used to ensure the continued operation of a company **after the death** of a director, but before the Executor under the Will has had the opportunity to administer the estate. (This is very different to an EPOA which ceases on death).

Here is an actual example using a typical Company Constitution

ABC Pty Ltd

Directors – John Smith and Ben Jones

Shareholders – Ordinary Shares – 108 Smith Trust and 12 The Jones Family Trust

The Constitution says the Office of Director becomes vacant on death, mental incapacity, or is absent from meetings for 6 months.

While the Shareholders vote, it is the Directors who carry on the Company's business, including borrowing, and other normal operations.

General POA are critical in a sole trader or two director company where every person is a "key person." For sole traders, if the Director is away (whether on holidays or work trips) or loses capacity to sign documents (due to illness or accident), the business could come to a grinding halt as no one is authorised to sign off on cheques or key documents, likely affecting cash flow of the business. This may be a problem even for two director companies.

Section 127 of the Corporations Act¹ requires two Directors or a Director and a Secretary of a company to execute documents. This means that if even one person loses capacity, the Company is powerless to sign documents or enter into agreements as the law requires a minimum of two signatures. A Company Power of Attorney can fix this problem.

Corporate Trustee of a Self-Managed Super Fund

This is different again as there are specific powers under the *Superannuation Industry Supervision (SIS) Act 1993* to ensure that an SMSF doesn't become non-complying simply because a member has lost capacity. In this case, under SIS s17(3) (b)² the incapacitated person's EPOA can become a director of the Corporate Trustee if the member is under a legal disability. Therefore for a Company that is only a Corporate Trustee of an SMSF, then a General POA is not needed as long as the member of the SMSF has an EPOA.

¹ http://classic.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s127.html

² http://classic.austlii.edu.au/au/legis/cth/consol_act/sia1993473/s17a.html

In summary

A person's Enduring Power of Attorney cannot be used to sign documents on their behalf in their capacity as Director of a Company. An EPOA can be used for shareholder duties.

A General POA is granted by the Company. It can be tailored to say it is for a specific time period, for certain tasks or for all Director tasks. Based on this, it is appropriate for all Companies who have two or less Directors to appoint a general POA, and it should be considered for other Companies with greater numbers of Directors as well.

As always, having the correct legal documents in place will ensure the smooth operation of your Company, regardless of your capacity.

Contact us

If you would like to further discuss how Corporate Powers of Attorney work, please feel free to contact one of our Wealth Managers to arrange a time. Alternatively, please contact your solicitor to arrange these important documents.



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