

Enduring Power of Attorney



The importance of an Enduring Power of Attorney

A Power of Attorney (POA) is a formal document that is a delegation of authority from one person (the principal) to another person (the attorney) allowing them to perform acts on behalf of the principal.

There are two types of POAs:

1. A General Power of Attorney:

- Provides an individual with the power to make financial decisions only on your behalf for a specific period/event
- Can only be used whilst you have capacity – that is, you are still able to make your own decisions
- Can cease when you lose capacity – that is, you are not able to make your own decisions.

2. An Enduring Power of Attorney:

- Provides an individual with the power to make financial and personal decisions only on your behalf
- Allows you to distinguish between personal health/financial matters and business matters
- Is not restricted to a specified event
- Does not cease if you lose capacity and may continue to be used when you are mentally unable to make decisions for yourself.

You are able to appoint more than one attorney to act on your behalf. This is often done as a precaution where one attorney may be unable to act for you due to illness, death or absence.

When appointing more than one attorney, you must give thought as to whether or not that authority is granted:

- **Solely** - one attorney to act
- **Jointly** - both attorneys must sign for the authority to be validly exercised
- **Severally** - any of the attorneys may sign for the authority to be validly exercised (not all signatures are required).

Conflict Clause in Enduring Powers of Attorney

A person acting as your Enduring Power of Attorney must avoid entering into transactions that may result, in their interests (or those of attorney's relations, business associates or close friends) conflicting with your interests.

Having conflict wording within an Enduring Power of Attorney (EPOA) is a best practice provision strongly recommended by good solicitors. It is included in the EPOA to allow an attorney to act even where they may have an interest themselves in the transaction.

The most common scenario is where a husband and wife are co-owners of a property that they are selling. If, for example, the wife is incapacitated (including because she is travelling interstate), the husband can sign the paperwork for the sale using the EPOA.

In this scenario, the husband has a legal conflict of interest in signing the property sale documentation on behalf of his wife (as well as signing for himself), because he is a co-owner of the property. Without a conflict clause included, he would not be permitted to sign the property sale documentation for his wife.

Other common conflict clauses may arise in circumstances where:

- You are the landlords to your children (i.e. you own the building that they rent for their business premises)
- You are the tenant in a building owned by your children
- You regularly pay school fees or other costs for your grandchildren
- You regularly provide financial assistance to one or more of your children
- One of your children provides you with professional services (e.g. Accounting) for which you pay, even if it is a reduced fee
- You have pension payments paid into a joint bank account.

If a conflict clause is not included, the utility of the EPOA is significantly undermined, and may cause significant issues in any of the above circumstances.

Why you need an Enduring Power of Attorney

An Enduring Power of Attorney is a very important document.

Consider the following case study.

Jamie is aged 30 and married with a newborn baby. He and his wife Clare jointly operate their bank account, however Jamie owns their home in his own name as he had purchased the house prior to their marriage, with a very large mortgage on it. Jamie is away for work when he has an accident and is now in an induced coma. He is expected to recover, however it may be a lengthy process. Jamie does not have an Enduring Power of Attorney because he thought it was something only old people needed to worry about.

Clare needs to claim on the income protection insurance owned by Jamie's Australian Retirement Trust Super Fund. She is unable to do this because she is not his Enduring Power of Attorney. Clare is also unable to negotiate with the Bank on getting the mortgage payments put on hold during this difficult time. Clare's only option is to apply to the Queensland Civil and Administrative Tribunal to be appointed as Jamie's Administrator and Guardian. Clare is very stressed by the paperwork required and the time it will take before she can deal with their financial matters. Having an Enduring Power of Attorney, would have allowed Clare to resolve these matters immediately on her own.

Application to Queensland Civil and Administrative Tribunal would be further complicated if other parties thought they had the right to perform the Administrator's role. For example, consider the case of an aged parent where various adult children wish to perform the role.

Having a well considered Enduring Power of Attorney means that you have made all of the decisions on who should take care of your personal/health and financial matters if you are unable to make the decisions yourself.

Contact us

If you would like to further discuss your Enduring Power of Attorney, please feel free to contact one of our Wealth Managers to arrange a time.



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For what matters