

THERE'S REAL POWER IN THAT POWER

It is one of life's imponderables that there is no definition of the term 'power of attorney' in the NSW Powers of Attorney Act 2003 nor in the Victorian equivalent (The Instruments Act 1958) nor any Commonwealth Act.

Some of those Acts define 'prescribed power of attorney' and 'enduring power of attorney' but both definitions assume that you know what a power of attorney is in the first place.

Powers of Attorney are becoming increasingly more used and useful and it is curious that there is no single legislative definition.

Based on the common law, a 'power of attorney' is a document a principal (a person or company) can sign to appoint another person (called the attorney) to act for the principal in relation to financial affairs, property matters or even, in some States, lifestyle matters such as medical treatment or where the principal lives and how they are cared for.

The document states what the attorney is authorised to do. This can be quite narrow and specific, or as general as the legislation in the principal's State or Territory allows. Any lawful action taken by the attorney under the power of attorney is binding on the principal, so it is important to appoint someone who can be trusted.

The power of attorney only exists while the principal is alive. Once they die the power dies with them and their Will becomes the important document.

The most common use of a power of attorney these days is the appointment of a principal's spouse or other close relative to deal with the principal's property if the principal becomes of unsound mind. This is the enduring power of attorney.

If their spouse or relationship partner is physically or mentally incapable of dealing with their affairs or property the attorney can do so under the power and save an enormous amount of stress and worry that would result if the affairs or property were frozen by their partner's incapacity.

Just about every married or de facto couple should have them.

But powers of attorney have wider uses than this.

The first is in the area of superannuation. The provisions that allow enduring attorneys to act as trustee (or director of the corporate trustee) of a Self Managed Superannuation Fund in place of the member are an important exception to the member-trustee requirement of Self Managed Super Funds ("SMSF").

The member remains a member of the fund but provided the formalities are properly followed they can appoint an

enduring attorney to be the trustee in their place. This allows members to enjoy the benefits of having their own SMSF without the onerous trustee duties and compliance responsibilities.

Enduring powers of attorney (EPOA's) have to be made in the approved form in accordance with the law of the applicable State or Territory. Most of the States recognise the EPOA properly made in another State as legally valid.

However, the power of the enduring attorney to act as trustee or director of the corporate trustee in place of the member of a SMSF is not derived from the State or Territory statutes that regulate the power of attorney. It is conferred by the Superannuation Industry Supervision Act 1993 which allows the enduring attorney as the legal personal representative to act as trustee or director of the corporate trustee in place of the member, and therefore effectively hold office in these capacities (s.17A(3)(b) SIS Act).

For SMSF purposes the member must appoint the enduring attorney first and then appoint them as trustee or trustee director. While the EPOA is current the member remains a member but is absolved from trustee responsibilities.

The use of the EPOA in SMSFs is not confined or contingent upon the member becoming incapacitated. In fact, the EPOA can be used much more widely. The member can relinquish their trustee functions to the enduring attorney as the replacement trustee so that they can pursue other activities or lifestyle choices.

The EPOA also allows SMSF members to live and work overseas but continue to maintain the Australian resident status of their SMSF.

It is possible to restrict the power of the enduring attorney through a limitation clause in the EPOA document. It can also be revoked by the member at any time as long as they are legally competent.

The second additional use of a power of attorney is for client share trading.

A limited power of attorney (LPOA) can be a very useful document for authorising and implementing share trading for the principal by their broker or planner.

But even if the client retains the selection of the investments, if the adviser has power to determine the timing of the transactions and to give effect to them, the adviser will need to hold an AFSL that authorises the provision of an Investor Directed Portfolio Service (IDPS).

ASIC defines an IDPS as a financial service for acquiring and holding investments that involve arrangements for the custody of assets and consolidated reporting in which the investor makes all the investment decisions. Usually this comprises offering a menu of investment options. Share trading may be permitted as an investment option as part of the service.

In an LPOA, the word "limited" means that certain critical functions remain with the principal. In financial

situations this typically means the principal retains control of account transactions such as payments and cash withdrawals, or maintains the right to make investment decisions like choosing which shares they want to trade.

An LPOA can be set up so that the client retains the right to choose which shares they will buy or sell and the obligation to make the payments for such trading. The attorney is empowered only to manage the paperwork for the trades and to assist with communication between the client and the share registry or fund manager.

Using an LPOA can assist financial planners to add value to their clients' investment dealings without needing to obtain additional financial services licensing authority.

The lack of an overly prescriptive legislative definition of the term power of attorney may be a blessing, allowing advisers the necessary flexibility to use these documents in a number of ways to help their clients.

If you have any questions in regard to this article, please contact **TOWNSENDS BUSINESS & CORPORATE LAWYERS** on **(02) 8296 6222**.

[Written by Peter Townsend (Principal) with the invaluable assistance of Maria Siu (Special Counsel) and Sandra Mencinskyj (Solicitor) all of Townsends Business & Corporate Lawyers]