

## Enduring Powers of Attorney: Pitfalls and Urban Myths

### Introduction

An enduring power of attorney ('EPOA') is among the most important legal documents that every person should have. They are used to appoint a person or persons to make financial, personal and health decisions when the principal becomes incapacitated, or at any nominated point for financial decisions. They can be used solely to appoint an attorney or attorneys for financial decisions and/or solely for personal and health decisions. Financial decisions relate to the principal's financial, property and legal affairs. Personal decisions relate to the principal's care or welfare.<sup>1</sup> Health decisions relate to the health care of the principal.<sup>2</sup> Different attorneys can be elected for each type of decision (financial or health and personal) and the terms for each attorney can be different.

EPOAs differ from General Powers of Attorney ('GPOA'), which are legal documents that are used to appoint a person or persons to make financial decisions on the principal's behalf – this can include a company. A GPOA can be limited, that is the power to make decisions can be for a specific period or event,<sup>3</sup> or they can be unlimited, allowing the attorney to make any financial or legal decision on the principal's behalf. For individuals, a GPOA is used when the principal has capacity and ends when either the principal or the attorney loses capacity or dies, or if it is revoked.

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<sup>1</sup> These include principal's place of residence, with whom the principal may live, if the principal works and where they work, their training and education, applications for licences or permits, diet and dress, consent to forensic examinations of the principal, the health care of the principal and legal matters not related to the principal's financial or property matters.

<sup>2</sup> These are defined in part 2 schedule 2 of the *Powers of Attorney 1998 (Qld)* act as the care, treatment, service or procedure for the health of the principal to diagnose, maintain or treat the principal's physical or mental condition and/or to be carried out by or under the supervision of a healthcare provider.

<sup>3</sup> For example, if a person was going overseas and needed to sell their house, they could appoint a GPOA to complete the transaction for them.

In comparison, EPOAs can only be revoked by the attorney while a person has capacity or by a decision of the Queensland Civil and Administration Tribunal, unless the attorney loses capacity, dies, becomes bankrupt or insolvent, or becomes the paid carer, health provider or service provider of the principal.<sup>4</sup> As such, (apart from under the circumstances listed) an attorney under an EPOA can only resign while the principal has capacity or with the consent of QCAT. On occasion, an EPOA document may specify when it will end or under what circumstances it may end – this is known as revocation according to terms.<sup>5</sup>

There are limitations on the powers that an attorney can exercise. Attorneys are unable to make or revoke the principal's will or power of attorney, they cannot vote for the principal, consent to the adoption of a child of the principal, consent to the marriage of the principal or make a special health decision. An EPOA will not allow a person to act as a trustee for another person, although there are some extremely limited statutory exceptions,<sup>6</sup> nor will it allow an attorney to act as a director of a company in the principal's place.

The duties and responsibilities of an attorney under an EPOA must be strictly observed. These general duties and responsibilities stipulate that an attorney must:

- abide by the General and Health Care Principles;<sup>7</sup>
- act honestly and diligently to safeguard the principal's interests;
- obey and follow the terms of the EPOA document;
- act carefully and prudently, and in the principal's best interests when managing the principal's money and property; and
- avoid conflict transactions unless specifically authorised in the EPOA document.

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<sup>4</sup> *Powers of Attorney Act 1998* (Qld) ss53-59AA. Note: if the attorney becomes the principal's paid carer or health provider, only the attorney's power for personal matters is revoked – see *Powers of Attorney Act 1998* (Qld) s 59.

<sup>5</sup> See *Powers of Attorney Act 1998* (Qld) s 54.

<sup>6</sup> These exceptions largely deal with superannuation and self-managed super funds. They will be discussed further in this paper.

<sup>7</sup> See *Powers of Attorney Act 1998* (Qld) sch 1.

In order to be eligible to be appointed as an attorney, a person must be at least 18 years old, not a paid carer or health provider of the principal and must not be a bankrupt or have any arrangement in place under the *Bankruptcy Act 1966* (Cth) in relation to their financial affairs if being appointed as an attorney for financial matters. The Public Trustee (for financial matters), the Public Guardian (for personal matters) and trustee companies can also be appointed as an enduring attorney.

### **Governing legislation**

The *Powers of Attorney Act 1998* (Qld), *Trusts Act 1973* (Qld) and *Guardianship and Administration Act 2000* (Qld) govern the EPOA laws in Queensland. Whilst the overall principles of an EPOA are fairly consistent all over Australia, some provisions differ from State to State.

For example, in Queensland, marriage may have an impact on the validity of a person's EPOA depending on who was appointed as an attorney, but does not have a similar effect in the rest of Australia.

### **Superannuation**

#### ***Individuals***

On an individual level, an EPOA can allow an attorney to apply for the early release of a principal's superannuation, especially if it is necessary to assist in the care and housing of the principal. This kind of action would need to be sanctioned by the EPOA document and it is important to be especially careful when drafting an EPOA to allow for conflict transactions, particularly if the attorney is the principal's spouse or partner.

#### ***Self-Managed Super Funds***

An EPOA is essential if the principal is the trustee of their own or a family self-managed superannuation fund (SMSF) or a director of the SMSF's corporate trustee. Typically, a trust deed provides that a trustee will cease to be a trustee if they lose legal capacity and

constitutions of trustee companies usually have similar provisions for directors. If mental incapacity of a trustee or director occurs, the SMSF is technically no longer a complying superannuation fund. This will result in the accompanying consequences (both taxation and otherwise) of non-compliance.

However, the *Superannuation Industry (Supervision) Act 1993* (Cth) allows a SMSFs continued compliance, provided that a legal personal representative of the incapacitated member, such as a person holding an EPOA granted by the member, is appointed within six months of the date when the member ceased to be a trustee.

Unfortunately, in the case of corporate trustees, the EPOA will not allow the attorney to exercise the member's powers as a director. However, it will allow the attorney to exercise the member's voting rights under the share held by the member. This will usually enable the attorney to be appointed as director of the trustee company via the shareholding if the principal is the majority shareholder or if the other shareholders consent to the appointment. It is important to review the SMSF's most recent trust deed when preparing an EPOA, so as to ensure that there are no conflicts between the two.

Appointing an attorney in relation to a SMSF is not just about ensuring compliance, but can also be used to ensure that the most appropriate replacement is chosen as trustee. Indeed, a member is able to execute an EPOA in favour of an existing member who is also a trustee. Then, once appointed, the attorney can perform their duties as a trustee of the SMSF or director of the trustee company, instead of as an agent for the member.

### ***Binding Death Benefit Nominations***

One area of potential difficulty in relation to superannuation and an attorney under an EPOA is that of binding death benefit nominations (BDBN), specifically whether and to what extent an attorney can make, revoke, confirm or amend a BDBN for the principal, particularly where the attorney is the beneficiary of the BDBN. This is especially important, as a member is in most cases required to renew a BDBN every three years.

Both the Superannuation Complaints Tribunal and the Federal Court have held that it is possible for an attorney to make a BDBN on behalf of a principal.<sup>8</sup> However, it is important to be cautious, as such actions may open up a person's estate and the attorney themselves to claims by disgruntled family members or other people interested in the principal's affairs.

However, if the principal is set on giving the attorney the power to sign or refresh a BDBN, in order to minimise liability, the power to do so and the principal's intentions should be clearly set out in the EPOA. For example, the EPOA could specify that the attorney has the power to refresh the BDBN every three years on behalf of the principal, with the EPOA either specifying who is to be nominated or that the attorney may only nominate the existing beneficiary.

### **Conflict Transactions**

Attorneys have a duty to avoid acting where there is or may be a conflict of interest. A conflict arises where the best interests of the principal may clash with those of the attorney or an attorney's relative, business associate or close friend; or some other duty of the attorney. This may be a particular issue when a person appoints their spouse under their EPOA.

There are some conflict transactions that are allowable under the *Powers of Attorney Act*.

These include:

- gifts to relatives or close friends for birthdays or seasonal events (for example, a birthday, marriage or Christmas);
- gifts to charity that the principal had made previously whilst they had capacity or that the principal might reasonably have made;
- meeting the reasonable financial needs of the principal's dependants; and

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<sup>8</sup> *Stock (as Executor of the Will of Mandie, Deceased) v N. M. Superannuation Pty Ltd* [2015] FCA 612.

- attending to property held jointly by the principal and attorney, where the attorney's interest in the joint property was gained while the principal had capacity.

The only other exception to this duty, outside of statute, is where the EPOA authorises either the particular transaction, that particular kind of transaction or conflict transactions generally.

However, on the whole, it is much easier to circumvent any potential problems that may come about from conflict transactions by inserting carefully constructed conflict transaction provisions in the EPOA, which will allow an attorney to undertake only the necessary conflict transactions and can forbid transactions that the principal feels are too risky or tempting.

Even with strict conflict transaction provisions, it is best to advise the client to be careful and consider whether they are necessary. Often, it is only advisable to have such provisions when the attorney appointed is the principal's spouse or one of the joint attorneys is the principal's spouse.

The most common conflict transaction provisions that we draft include provisions that allow attorneys to:

- refresh or reinstate BDBNs particularly when they are in favour of the attorney;
- use the principal's assets to ensure that the principal and their spouse are provided with the appropriate accommodation and care; and
- use the principal's assets to pay for any entry fees or bonds for accommodation for the principal and their spouse (e.g. when they are going into Aged Care).

The EPOA document should also specify that these conflict transaction clauses do not relieve attorneys of their obligations under the legislation or grant them the ability to enter into conflict transactions generally.

## **Partnerships of Individuals**

An attorney under an EPOA does have the power to carry on the trade or business of a principal.<sup>9</sup> Therefore, it is not unreasonable for an attorney to act as a partner on the principal's behalf, once the principal is incapacitated.

It is also possible for a partner to apply to the courts to dissolve a partnership due to their business partner losing capacity.<sup>10</sup> The continued operation of the partnership will also depend on any Partnership Agreement or Buy/Sell Agreement that have been put in place, the attitudes of the other partner/s in the partnership and the limitations of the EPOA.

It is therefore extremely important to review all relevant partnership documents when drafting an EPOA, in order to ensure that your wishes can be carried out.

## **Directors**

Typically under a company constitution, a director will automatically lose office as soon as they lose mental capacity. It is a common misconception that, upon the loss of capacity, a director's attorney automatically becomes the director or can exercise the director rights. This is simply not true.<sup>11</sup> EPOAs will not allow a person, in their capacity as an attorney, to act as a director of a company for the principal. This is because the office of a director is a personal responsibility, not a proprietary right capable of being exercised of an attorney.<sup>12</sup>

As mentioned earlier in the '**Superannuation**' section, it may be possible for an attorney to use the shareholder voting rights of the principal to enable the attorney to be appointed as a director of the company.

In the alternative, an attorney may be able to be appointed as an alternative or successor director if allowed by the constitution of the company, including corporate trustees. Using this strategy, a director can appoint one or more persons to assume the director's role in the

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<sup>9</sup> *Powers of Attorney Act 1998* (Qld) sch 2, pt 1 (definition of 'financial matter' para (d)).

<sup>10</sup> *Partnership Act 1891* (Qld) s 38(a).

<sup>11</sup> See, eg, *Saad v Doumeny Holdings Pty Limited* [2005] NSWSC 893 [17].

<sup>12</sup> *Mancini v Mancini* [1999] NSWSC 799 [30].

case of the original director's mental incapacity - provided that the company's constitution allows this and the relevant documents are completed.

Few company constitutions allow for the use of successor directors, so it is important to review the company documents in order to ensure that this implementation is possible if desired.

The alternative to this would be for the company itself to appoint one or more attorneys by way of General Power of Attorney, so if the sole Director were to lose capacity, the appointed attorney(s) of the company can carry on the company's operations.

### **Shareholders**

An attorney appointed under an EPOA for financial matters has the power to make financial decisions about a principal's property and financial affairs – including the power to buy or sell shares and the use of any rights associated with the principal's shares.

### **Trusts**

#### ***Beneficiaries***

As an EPOA gives attorneys the power to make financial decisions on behalf of the principal, an attorney can control or use any benefit paid to the principal from a trust as they see fit; provided that the attorney's decisions are in line with their duty and responsibilities as an attorney and with the relevant EPOA and trust documents.

#### ***Trustees***

The only statutory exception that allows an EPOA to act as a trustee is for a SMSF, as mentioned above in the 'Superannuation' section. As stated above, the options available to consider where a trustee may lose capacity would be to either appoint a substitute trustee or delegate power as trustee by way of a Deed of Delegation, if allowed by the Trust Deed.



## ***Appointors***

Whilst not necessarily statutorily enabled, many trust deeds now provide for the succession of appointors by deed. Failing such an appointment prior to the appointor's incapacity, the appointor's legal personal representative (their EPOA) may become the default controller/appointor of the trust. This position is commonly associated with the power to remove and replace trustees, although it can also give other powers (for example the 'reserve power' which requires the trustee to obtain the appointor's consent before exercising certain express powers). If a principal of an EPOA has a trust and their chosen attorney is a beneficiary of the trust, it may be necessary to consider the appropriateness of the attorney acting as appointor.

It is vital to review the trust deed and determine who holds the various positions under the Trust and what powers each position confers, as well as seeing what provisions are allowed under the deed.

## **Conclusion**

EPOAs are a complex and highly important tool in both your business and personal life, with many different applications. It is often necessary to review every aspect of your life in order to tailor an EPOA that fully reflects your wishes and it is often the case that you only get what you pay for. A good EPOA will consider you from an individual, as well as a business perspective and the effect of an EPOA on your relevant business structures.