

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.

An enduring power of attorney is a legal document that permits another individual to conduct financial and business affairs for a person when they do not have capacity to make the decisions themselves.

The person appointed 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.

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

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

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.

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.

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

Why appoint an Enduring Power of Attorney?

By appointing an enduring power of attorney you are eliminating the potential stress and expense on your loved ones should you lose mental capacity and not have an enduring power of attorney in place. 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 loved ones as they will not be able to make these decisions for you unless you have appointed an attorney. Instead, they will need to apply to the Guardianship and Administration Tribunal to be appointed as your guardian, which can end up being an expensive process.

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

This means that if a member departs overseas for an indefinite period of time, a member's attorney can 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.

Why is an enduring **Power of Attorney** essential?



Who should you appoint as your Attorney?

Your enduring power of 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, 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.

We recommend appointing more than one attorney to allow for situations where an attorney cannot act.

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. The time to appoint an attorney is right now. 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, or if, you 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.

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.

For further information on this topic, or to discuss your specific situation, please call us on 1300 032 020

The Bell Direct service is provided by Third Party Platform Pty Limited trading as "Bell Direct" (ABN 74 121 227 905) an Australian Financial Services licensee (AFSL 314341) a Participant of the ASX Limited Group and a Trading Participant of Chi-X. Bell Direct does not provide investment advice. You should consider your own financial situation, particular needs and investment objectives before acting on any of the information available in this document.

This information is provided by SuperGuardian Pty Ltd, AFSL No. 485643. The information is general information only and does not take into account your objectives, financial situation or needs. You should obtain professional advice before acting on any of this information. Please refer to SuperGuardian's FSG (available at <https://www.superguardian.com.au/pdfs/Financial-Services-Guide.pdf>) for contact information and information about any remuneration and associations with product issuers.