"THERE IN SPIRIT"
POWERS OF ATTORNEY IN THE SME CONTEXT

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1. The leading text "Powers of Attorney"[1] provides that a power of attorney has three features
    a. it is formed via a document or instrument that is formal as opposed to informal;
    b. it is designed to effect a relationship whereby one person represents another;
    c. there may be limits to the scope of that representation.

2. A power of attorney is a form of agency. A power of attorney confers authority, and does not affect title, rights or obligations.[2] The principal does not lose the principal's ability to act – the principal can continue to operate bank accounts and sell real estate, the power of attorney is not an exclusive grant of authority. This is in contrast to a financial management order, where the principal's estate is committed to management and the principal loses the ability to manage their finances.[3]

Legal Requirements

3. A NSW power of attorney is created under the *Powers of Attorney Act* 2003 (NSW) ("**POA Act**"). Subject to the POA Act, a power of attorney in the prescribed form confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.[4] The prescribed form is set out in Schedule 2 of the POA Act.

4. The principal may appoint any person over 18 to be their attorney. When the principal selects their attorney, they should keep in mind that a power of attorney is a very powerful instrument, difficult and complex financial decisions may need to be made, and it may last for some years, particularly if the principal ultimately has dementia for some years.

- real estate

5. Any power of attorney may be registered.[5] A conveyance or other deed affecting land under a power of attorney has no effect unless the instrument creating the power has been registered.[6] The LPI will not register a sale, mortgage, lease or other dealing affecting real estate or water access licence unless there is a registered power of attorney.[7]

- enduring

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1 para 1.2 Del Pont, G "Powers of Attorney" 2011, Lexis Nexus
2 *Gibbons v Wright* (1954) 91 CLR 423 per Dixon CJ, Kitto, Taylor J.
3 section 25E Guardianship Act 1987
4 section 9 POA Act
5 section 51 POA Act
6 section 52 POA Act
7 http://www.lpi.nsw.gov.au/about_lpi/faqs/land_title/whats_a_power_of_attorney

6. An ordinary power of attorney terminates when the principal loses capacity. An enduring power of attorney continues after the principal loses capacity.[8]

7. An enduring power of attorney must be expressed to be given with the intention that will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument the principal's signature is witnessed by a prescribed witness, and there is a certificate annexed to or endorsed on the instrument signed by the prescribed witness that the prescribed witness explained the effect of the power before it was signed, the principal appeared to understand the explanation, the witness witnessed the signature, the witness is a prescribed witness and the prescribed witness is not the attorney.[9]

- *irrevocable*

8. The attorney under an ordinary power of attorney has a fiduciary duty to the principal. However, the attorney under an irrevocable power of attorney does not have fiduciary duties to the principal, and may act independently of the principal and contrary to the principal's directions.[10]

9. An irrevocable power of attorney must be expressed to be irrevocable, and the power of attorney is given for valuable consideration or is expressed to be given for valuable consideration.[11]

10. The power is not revoked or terminated, and is effective, notwithstanding anything done by the principal without the concurrence of the attorney, the bankruptcy of the principal, the mental incapacity of the principal, the principal becoming a mentally incapacitated person, the principal becoming a person who is a managed missing person within the meaning of the *NSW Trustee and Guardian Act,* the death of the principal, and if the principal is a corporation, the dissolution of the corporation. [12]

11. Irrevocable powers of attorney are useful in commercial transactions where it is anticipated that a party will need to take further steps after the agreement is signed to complete the transaction. For example, after the agreement is signed, a party may need to execute documents, lodge forms at ASIC, vote in a certain way at a general meeting or grant a proxy at a general meeting. If the party does not perform, the other party may not be able to obtain specific performance and may be limited to monetary damages. This may be an unsatisfactory remedy, particularly if the party is impecunious. If the other party obtains the party's irrevocable power of attorney, then the other party can perform the tasks if the party is unable or unwilling to perform.

- proxy

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[8] section 21 POA Act
[9] section 19, POA Act
[10] *Quest Rose Hill Pty Ltd v White* [2010] NSWSC 939 (Ward J)
[11] section 15, POA Act
[12] section 16 POA Act

12. If a person is voting at a meeting pursuant to a power of attorney, the power of attorney must comply with sections 250A and 250B of the Corporations Act which are the requirements for a valid proxy.[13]

Fiduciary Duties

13. A power of attorney is a species of agency. Like any other agent, the attorney has fiduciary duties to the principal. The exception is irrevocable powers of attorney.

14. The attorney under a prescribed power of attorney does not generally confer authority to give gifts,[14] confer benefits on the attorney,[15] or confer benefits on third parties[16] unless the instrument creating the power expressly authorizes the giving of the gift or conferring the benefit.

15. The prescribed forms in Schedule 2 provide an option that the principal may authorise the attorney to give reasonable gifts, and can confer benefits to meet reasonable medical and living expenses of the attorney and third parties. [17] However, even if the option is chosen it is limited to reasonable, having regard to the principal's financial circumstances and the size of the principal's estate.

16. In any case, the general law relating to fiduciary duties may still apply, because the POA Act does not the operation of any principle or rule of the common law or equity. [18] An attorney can only confer benefits on the attorney if there is informed consent by the principal. The principal cannot give informed consent if the principal has lost capacity.

17. Further, if the attorney confers too many benefits on himself/herself, it may be grounds for reviewing the power of attorney or for making a financial management order. In *Re R*[19], the attorney had power to confer benefits on himself. He borrowed $4,000,000 from the estate, at no interest, secured by an unregistered mortgage on a house that the attorney bought with the money. The attorney argued he was merely continuing the principal's tax arrangement strategies. Other interested parties successfully applied to the Guardianship Tribunal for a financial management order. Young J dismissed the attorney's appeal from the Guardianship Tribunal and said at para 52

> "the Tribunal directed itself to the key question. This was whether there was going to be a danger of exploitation in the existing arrangement. Would there be a danger that even though he might be authorised to do so, the plaintiff might breach his fiduciary duties, perhaps taking the view that he was not breaching his fiduciary duties if he managed the estate in such a way that he would eventually inherit more than he had at the moment?"

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[13] para 7.560, Ford's Corporations Law, Lexis Nexis 2010; *Cordiant Communications (Aust) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185; 23 ACLC 1859; 194 FLR 322; [2005] NSWSC 1005
[14] section 11 POA Act
[15] section 12 POA Act
[16] section 13 POA Act
[17] Clauses 5, 6 and 7, Part 2, Schedule 2 POA Act
[18] section 7 POA Act
[19] *In Re R* [2000] NSWSC 886 (unreported, 17 August 2000, Young J)

Scope of authority

18. The power can be limited – it may apply to limited specific assets, or may apply to all of the principal's assets and powers of appointment.

19. The POA provides that the instrument confers on the attorney "anything that the principal may lawfully authorise an attorney to do". Like any other agent, there are limits to the scope of the attorney's authority, there are limits to what a donor can legally authorise the attorney to do.

- personal roles

20. The donor cannot authorise the attorney to do anything which is personal to the principal cannot delegate.

21. The attorney cannot execute the donor's will.

22. If the principal is a company director, the principal cannot authorise an attorney to act for the director because the role of a director is a personal role. In *Mancini v Mancini*[20], Bryson said[21]

> "The office of a director is a personal responsibility, and can only be discharged by the person who holds the office. If there is any exception, it must be found in the constitution of the company and in some authorisation there found to act by an alternate or other substitute or delegate. The office of a director is not a property right capable of being exercised by an attorney or other substitute or delegate of the person holding the office; many rights as shareholder can be distinguished in this respect because they are rights of property***."***

23. However, a company may grant a person a power of attorney, and the attorney can act for the company.

24. If the principal is a trustee, the attorney cannot exercise any function as a trustee.[22] This is consistent with the general law that the trustee cannot delegate because the office of trustee is one of personal trust and confidence, a person who holds such apposition is required to exercise its own judgment and discretion. In *Robson v Flight*[23], Lord Westbury LC said[24]

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[20] *Mancini v Mancini* [1999] NSWSC 799
[21] ibid at [30]
[22] section 10 POA Act
[23] *Robson v Flight* (1865) 4 De GJ & S 608
[24] ibid at 613

> "Such trusts and powers are supposed to have been committed by the testator to the trustees he appoints by reason of his personal confidence in their discretion, and it would be wrong to permit them to be exercised by … [another] …"

25. Whilst equity does not allow a trustee to delegate its duties, equity does allow a trustee to appoint agents.[25] A trustee may appoint agents in the course of administration of a trust. In *Learoyd v Whiteley*[26], Lord Watson said[27]

> "I have only to observe further that whilst trustees cannot delegate the execution of the trust, they may, as was held by this House in Speight v Gaunt, avail themselves of the services of others wherever such employment is according to the usual course of business"

26. There is a statutory exception for these rules in relation to self-managed superannuation funds. Self-managed superannuation funds require that the trustees, or all of the directors of the corporate trustee are members of the superannuation fund or a relative of the member. This causes a problem if it is a sole member / sole director superannuation fund, and the sole member has a legal disability – the member cannot act as a director or trustee because the member does not have capacity, but the member cannot delegate the member's director's role or trustee's role because it is personal. The *Superannuation Industry Supervision Act* provides that a fund may still be a self managed superannuation fund if the member has a legal personal representative who acts as trustee or director of the corporate trustee whilst the member is under a legal disability or if the legal personal representative has an enduring power of attorney.[28] Legal personal representative is defined to include a trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney. [29]

- personal issues

27. The scope of the power is limited to financial issues. A power of attorney only authorises an attorney to act in relation to financial matters. It does not allow the attorney to make personal (including medical) decisions for the donor – a person may appoint an enduring guardian and the guardian can decide where a person should live, what healthcare and personal services they should receive and can

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[25] *Speight v Gaunt* (1883) 9 App Cas 1)
[26] *Learoyd v Whiteley* (1887) 12 App Cas 727
[27] ibid at 734

[28] section 17A(3)(b) Superannuation Industry Supervision Act 1993
[29] "legal personal representative" section 10 Superannuation Industry Supervision Act 1993

consent to carrying out medical and dental treatment in circumstance where a person has no capacity to decide.[30]

- *sub-delegation*

28. An attorney under a power of attorney cannot appoint a substitute, delegate or sub-attorney unless the instrument creating the power expressly provides for the attorney to do so.[31]

Utility

29. Powers of attorney are useful instruments in a personal context, from making sure that someone is authorised to sign a cheque to pay the electricity bill when the principal is on holidays to selling the house when the principal loses capacity and needs to pay for an accommodation bond at a nursing home.

30. However, powers of attorney are critical in sole trader / SME where every employee is a "key man". Employees also go on holidays, and employees may also lose capacity on a temporary or a permanent basis (for example, a stroke, a car accident). No-one may be entitled to sign the cheques, and there may be limited ability to change the signatories. A power of attorney should be part of a business' risk management strategy to ensure that a void does not develop.

31. In addition, a company may grant a power of attorney to allow an attorney to execute and complete a whole transaction. The other parties may be more comfortable with a power of attorney, particularly a registered power of attorney, than a board minute of a board resolution. Alternatively, a company may grant a power of attorney to complete recurrent routine transactions so that two directors do not need to sign. For example, a bank may grant a power of attorney to a junior officer to sign the bank's residential mortgages.

32. The usefulness of a power of attorney was highlighted in *Australian Securities Commission v Kutzner*, where Heerey J in the Federal Court said that requiring a person to give "reasonable assistance" to ASC (the predecessor to ASIC) where ASC was investigating and it believed a person may be able to give relevant information may include requiring the person to sign a power of attorney.32 This allowed the ASIC officer to inspect a Mauritius company's books and records and share register.

Taking instructions

33. The principal needs to understand to extent of the power and be aware of the risk of abuse of the power. In *Szozda v Szozda* [2010] NSWSC 804, Barrett J summarised the principles in a colourful example – a guide to the types of suggestions that should be made to the prospective principal to explain the significance of what they are doing[33]

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[30] section 6F *Guardianship Act* 1987 and Part 2 "Appointment of Enduring Guardians"
[31] section 45 POA Act
[32] *Australian Securities Commission v Kutzner* (1998) 25 ACSR 723; 16 ACLC 182
[33] *Szozda v Szozda* [2010] NSWSC 804

> "The central concept is thus one of complete and lasting delegation to a particular person, albeit with the ability to put an end to the delegation while capacity to do so remains. That concept of empowering another person to act generally in relation to one's affairs raises two basic questions. First, is it to my benefit and in my interests to allow another person to have control over the whole of my affairs so that they can act in those affairs in any way in which I could myself act — but with no duty to seek my permission in advance or to tell me after the event, so that they can, if they so decide, do things in my affairs that I would myself wish to do (such as pay my bills and make sure that cheques arriving in the post are put safely into the bank) and also things that I would not choose to do and would not wish to see done — sell my treasured stamp collection; stop the monthly allowance I pay to my grandson; exercise my power as appointor under the family trust and thereby change the children and grandchildren who are to be income beneficiaries; instruct my financial adviser to sell all my blue chip shares and to buy instead collateralised debt obligations in New York; have my dog put down; sell my house; buy a place for me in a nursing home? Second, is it to my benefit and in my interests that all these things — indeed, everything that I can myself lawfully do — can be done by the particular person who is to be my attorney? Is that person someone who is trustworthy and sufficiently responsible and wise to deal prudently with my affairs and to judge when to seek assistance and advice? The decision is one in which considerations of surrender of personal independence and considerations of trust and confidence play an overwhelmingly predominant role: am I satisfied that I want someone else to be in a position to dictate what happens at all levels of my affairs and in relation to each and every item of my property and that the particular person concerned will act justly and wisely in making decisions?"

34. It may be difficult to be comfortable that the principal understands the extent of the power and the risks if the principal has faltering capacity, and the SME or family arrangements are complex involving discretionary trusts, different classes of shares, and subordinated debt. Barrett J was not comfortable with the solicitor's explanations of the power of attorney to Mrs Szozda and said[34]

> "Each of Mr Marsh and Mr Eriksen explained to Mrs Szozda in broad terms the general nature of the general and enduring power of attorney — in essence, that Barbara (or, in default, Mr Marsh and Mark together) would have authority to do anything and everything that Mrs Szozda herself could do. Each received from Mrs Szozda a generalised statement of acceptance or understanding of what was said to her. Neither, however, referred to any particular things that the attorney could do or to particular aspects of the family companies and family trusts in relation to which the attorney could act; nor did either probe Mrs Szozda by, for example, asking her to repeat what had been said to her or putting questions about aspects of her property and affairs answers to which might have formed a basis for specific questions or comments designed to ensure that an informed understanding had been received and was held.

[34] *Szozda* at para 119

35. A power of attorney in small company that delicately balances the power of one shareholder may become a tool of oppression of the minority if one or two shareholders grant a power to another shareholder. For example, elderly parents may appoint one son as their power of attorney – the son may use his rights relating to his own shares and the rights attached to his elderly parents shares to oppress his two sisters. It would be wise to advise the parents of this risk and expressly limit the way that the power can be used, or appoint the children jointly.

Revoke or Review

36. The principal should notify the attorney in writing – an attorney is entitled to rely on the power if the attorney is not aware of the termination or suspension[35] and a third party who deals or otherwise transacts with the attorney in good faith is entitled to rely on it if they are not aware of the termination or suspension.[36] An attorney who knows of the termination must not do any act or thing under the power of attorney – the maximum term of imprisonment is 5 years.[37]

37. The challenge with revoking an *enduring* power of attorney that is being abused is that the person who is being abused may not have capacity to revoke the power, and a person who is incommunicate may not be able to revoke an ordinary power of attorney. The Guardianship Tribunal and the Supreme Court may review an enduring power of attorney or an ordinary power of attorney where the principal is incommunicate[38]. The people who can apply for review include any other person who in the tribunal's opinion has a proper interest in the proceedings or a genuine concern for the principal's welfare[39] The tribunal may make orders if it is satisfied that it would be in the best interests of the principal or that it would better reflect the wishes of the principal[40] The orders that the tribunal may make include removing a person as an attorney[41], appointing a substitute attorney if an attorney has been removed or otherwise vacated office[42], or requiring the attorney to furnish accounts or other information to the tribunal or other person nominated by the tribunal and the accounts be audited, [43]or requiring the attorney to prepare a financial management plan.[44] However, the Supreme Court or the Guardianship Tribunal may treat the application as an application for a financial management order.[45]

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[35] section 47, POA Act
[36] section 48, POA Act
[37] section 49, POA Act
[38] section 26 and 33(2), POA Act
[39] section 35 POA Act
[40] section 36(4), POA Act.
[41] Section 36(4)(b), POA Act
[42] section 36(4)(c), POA Act
[43] section 36(4)(e), POA Act
[44] section 36(4)(e)(iv), POA Act
[45] section 37, POA Act