

Does My Company Need A Power Of Attorney?

Making your Will and Enduring Power of Attorney is an important step towards getting your estate planning sorted, but if you have one or more companies that you control, you may also need to consider a power of attorney for those companies.

What is a company power of attorney?

A company power of attorney can be a powerful tool in the event of an emergency e.g. the sole director or all the directors of the company are not available because they have died or lost capacity.

It can also be a useful document if the directors of a company are overseas or travelling during a project that will require their signature.

If a company makes a power of attorney, the company is nominating one or more people (**the attorney**) to act on the company's behalf.

The terms on which the attorney act for the company can be customised for each company, for example:

- the attorney's powers can start immediately, on a specified date, or when a specific event happens (e.g. your death or incapacity)
- the attorney can step into the shoes of the company directors and do everything that the company could typically do, or the attorney can be appointed to undertake specific actions only

Importantly, the attorney doesn't replace the directors of the company.

If the company has one or more directors, then actions of the company can be undertaken by either the directors or by the attorney.

If there are no directors for the company (e.g. because they have all died/lost capacity) then the attorney can take care of the company's affairs while new directors are being appointed.

A company power of attorney is usually viewed as a short term solution to assist with maintaining the "status quo" for the company, while the longer term succession plan is being sorted out.

When would a company need to appoint a power of attorney?

Appointing an attorney for a company is a prudent and important succession planning step, especially for companies that are running businesses or undertaking time sensitive activities.

A company power of attorney is typically a short term solution to keep the company operations going while the necessary paperwork and approvals are obtained to appoint a replacement director.

If a company does not have a director, then it cannot do things like:

- access funds in bank accounts
- enter into contracts
- pay staff
- hire new staff

Having a company power of attorney is critical to “keeping the lights on” if there is an unexpected event affecting the directors of the company.

Not all companies require a power of attorney. Here’s a list of factors to help consider if a power of attorney will be valuable for your company:

VERY IMPORTANT WHERE:

- Wages to pay
- Regular accounts payable and debts to pay
- Need to enter into contracts with suppliers frequently
- Need to hire/fire staff to triage loss of key person
- Require someone qualified to keep third party licencing
- For a defined purpose e.g. director/trustee overseas and specific contract needs to be signed

NOT SO IMPORTANT WHERE:

- Activities are ‘passive’ (for example, holding investments) and unlikely to be time sensitive
- No staff and no wages
- Don’t need to regularly pay bills or enter into contracts

What happens to my company if I die or lose capacity without a company power of attorney?

A company power of attorney is only one piece of the puzzle when it comes to succession planning for companies.

The assets owned in the company do not form part of your estate and are not dealt with under your Will or Enduring Power of Attorney. You cannot use your Will to gift assets in the company to your loved ones and your Enduring Power of Attorney cannot be directly used to run the company if you lose capacity.

The company continues after you or any of the other shareholders or directors die or lose capacity, and the assets will continue to be owned by the company.

However, your personal Will and Enduring Power of Attorney are still relevant for the long term succession plan of the company.

If you are a **shareholder** of a company, then:

WHAT HAPPENS WHEN YOU DIE?	WHAT HAPPENS IF YOU LOSE CAPACITY?
The shares you own in the company can be gifted under your will. Your chosen recipients will not be able to control your shares until probate of your will is granted and the administration of your estate is finalised. This is a lengthy process and can sometimes take several years. Until the administration of your estate is finalised, your shares will be held and controlled by your executor. Your executor will not be able to take any actions in relation to your shares (e.g. using your shares to appoint new directors for the company) until a grant of probate is obtained. This process can take several months from the date of your death. The actions your executor can take may also be more limited than an attorney acting under a comprehensive power of attorney for the company.	If you have lost capacity to make financial decisions, your shares will be held and controlled by the attorneys you have nominated under your personal Enduring Power of Attorney. Your personal attorneys can “step into your shoes” and take any actions in relation to your shares that you would have taken, subject to their duty to act in your best interests. The actions your personal attorneys can take may also be more limited than an attorney acting under a comprehensive power of attorney for the company.

If you are a **director** of a company, then:

WHAT HAPPENS WHEN YOU DIE?	WHAT HAPPENS IF YOU LOSE CAPACITY?
Your appointment as a director ends immediately. The shareholders of the company will have to vote and take steps to appoint a replacement director. As mentioned above, if you were also a shareholder then it can be a lengthy process to appoint a new director.	Your appointment as a director ends immediately. The shareholders of the company will have to vote and take steps to appoint a replacement director.

As you can imagine, there is a lot of paperwork to be prepared and signed, and notifications must be lodged with ASIC and any financier when a company director or shareholder dies or loses capacity.

It is typically a very time consuming process involving lawyers, accountants and financiers.

If your company is undertaking activities where it needs to interact with customers, staff and suppliers, then having a company power of attorney in place can mean the company operations can continue to be carried on seamlessly by a trusted person with the appropriate authorisations.

It is an essential document for protecting the company's business and ensuring it can keep operating until the longer term succession plan is put in place.

If you have any questions about succession planning for your company, please get in touch.