

Does My Trust 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 trusts in your family group, you may also need to consider a power of attorney for those trusts.

What type of trustee does the trust have?

A power of attorney can be a powerful tool in the event of an emergency for a trust with a company acting as trustee (often referred to as a **corporate trustee**).

If your trust has one or more individual trustees (i.e. the trustee is a person, not a company) then a power of attorney for the trust will not be suitable. Instead we recommend you read the flyer "What Happens To Your Family Trust After You Die?"

What is a power of attorney for a trust?

A power of attorney can be a useful document for a corporate trustee if the sole director or all the directors of the corporate trustee:

- are not available because they have died or lost capacity; or
- are overseas or travelling during a project that will require their signature.

If a corporate trustee makes a power of attorney, it is nominating one or more people (**the attorney**) to act on the trustee's behalf in relation to the trust.

The terms on which the attorney act for the corporate trustee can be customised for each trust, 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 directors of the corporate trustee and do everything that the corporate trustee could typically do in relation to the trust, or the attorney can be appointed to undertake specific actions only

Importantly, the attorney doesn't replace the directors of the corporate trustee.

If the corporate trustee has one or more directors, then its actions as trustee for the trust can be undertaken by either the directors or by the attorney.

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

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

When would a corporate trustee need to appoint a power of attorney?

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

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

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

- access funds in bank accounts
- enter into contracts
- pay staff
- hire new staff
- distribute income and capital from the trust
- make loans from the trust

Having a power of attorney for a corporate trustee is critical to "keeping the lights on" if there is an unexpected event affecting the directors of the corporate trustee.

Not all trusts require a power of attorney. Here's a list of factors to help consider if a power of attorney will be valuable for your trust:

VERY IMPORTANT WHERE:

- The trust has a corporate trustee
- 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
- Income or capital needs to be distributed from the trust

NOT SO IMPORTANT WHERE:

- The trust has one or more individual trustees
- 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 corporate trustee if I die or lose capacity without a company power of attorney?

As mentioned above, a power of attorney for a corporate trustee is only one piece of the puzzle when it comes to succession planning for trusts.

In relation to steps that can be taken for the longer term succession plan for a trust, we recommend reading the flyer “What Happens To Your Family Trust After You Die?”.

The assets owned in the trust 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 trust to your loved ones.

The trust continues after you die or lose capacity, and the assets will continue to be owned by the trust.

However, your personal Will and Enduring Power of Attorney will also be relevant for the long term succession plan of the corporate trustee.

If you are a **shareholder** of a corporate trustee, then:

WHAT HAPPENS WHEN YOU DIE?	WHAT HAPPENS IF YOU LOSE CAPACITY?
The shares you own in the corporate trustee 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 corporate trustee) 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 trust.	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 trust.

If you are a **director** of a corporate trustee, then:

WHAT HAPPENS WHEN YOU DIE?	WHAT HAPPENS IF YOU LOSE CAPACITY?
Your appointment as a director ends immediately. The shareholders of the corporate trustee 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 corporate trustee 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 director or shareholder of a corporate trustee dies or loses capacity.

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

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

It is an essential document for protecting the trust'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 trust, please get in touch.