

# FARM BUSINESS FACT SHEET



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## Key points

- The choice of an attorney is an extremely important one
- Do not appoint a person as your attorney unless you are completely confident that they will act honestly and sensibly
- The choice of two or more people to act jointly or in a majority can be highly effective in reducing the risk of dishonesty or inappropriate decisions
- Appointing an attorney with farming or agricultural knowledge is recommended
- Attorneys should be in a position to provide an explanation of all transactions completed
- A Financial and Personal Enduring Power of Attorney document allows the appointed attorney to sign on behalf of the principal any document which has a financial connection
- When making a Medical Treatment Enduring Power of Attorney it is important that you discuss, in advance, your medical treatment wishes with your appointed attorney ('medical agent')

## Enduring Power(s) of Attorney

If you as a business owner are temporarily, or even permanently, incapacitated, key decisions still need to be made and turning your mind to making sure your wishes are known and able to be implemented is a wise step to take immediately. This Fact Sheet outlines considerations to be aware of when selecting the best person to be your attorney and when generating an Enduring Power(s) of Attorney.

### Background

An attorney is someone appointed by you, the 'principal', to make decisions at your exact direction or when you are incapacitated. The types of decisions they can make and actions they can take are limited by the powers granted to them.

A Power of Attorney is the legal document authorising a person to act on another person's behalf. Depending on the type of power given, the appointed attorney(s) may be able to make financial, legal, personal or medical decisions for the 'principal'.

### TYPES OF ENDURING POWER OF ATTORNEY

There are two different Enduring Powers of Attorney:

- Financial and Personal Enduring Power of Attorney
- Medical Treatment Enduring Power of Attorney

Most of the Powers of Attorney that are made today are the enduring types (or EPAs). 'Enduring' means that if a person (the 'principal') becomes incapable of making decisions the Power(s) of Attorney continue to be effective and valid.

For those involved in agriculture, it is prudent to appoint an attorney who has knowledge of farming management practices.

It is possible to nominate one or more attorneys and they can act either jointly, separately or in a majority. 'Jointly' means all must act together and agree on all decisions made. For your benefit, at least one of them should have farming knowledge.

You can also nominate one individual to be your initial attorney, but if that person is unable to act you can then nominate a substitute attorney or attorneys.

## Who is eligible to be appointed as an attorney?

A person who:

- is 18 years of age or over;
- is not insolvent or under administration; and
- has not been convicted or found guilty of an offence involving dishonesty – unless the proposed attorney discloses the offence to the principal and the offence is recorded in the Enduring Power of Attorney document.

A trustee company can be appointed an attorney for financial matters only.

## The importance of choosing the right attorney

Your attorney(s) should only make decisions at your exact direction. However, it is still possible that they will make inappropriate decisions without your knowledge, even while you have capacity, and therefore, it is important you choose the right attorney(s).

### CASE STUDY

One notable disaster involving a Financial Enduring Power of Attorney occurred more than 10 years ago in Victoria. A 30-year-old man had become a paraplegic because of a work-related incident. He received \$300,000 compensation and placed that money in an account with the Commonwealth Bank. After completing rehabilitation, he returned to live with his mother. This event occurred prior to internet banking and as it was difficult for the gentleman to attend the bank himself he made an Enduring Power of Attorney in favour of his mother and authorised her to withdraw funds as he needed from time to time. Tragically, the mother had an addiction to poker machines and started to withdraw very large sums of money on a weekly basis, which were entirely gambled away. After 12 months, his mother had exhausted the compensation benefit of \$300,000 and it was only then that the disaster was discovered. The mother was charged with theft and the matter received a large amount of coverage in the media. While she was ultimately sent to jail, the bank had no obligation to repay the money to the son, as he had given a complete authority to his mother to make transactions on his behalf. For all the bank knew, the money was handed from mother back to son and he was making decisions in relation to the money.

You need to be aware that:

- The choice of an attorney is extremely important and you should not allocate the task of being your attorney to anyone unless you are completely confident that they will act honestly and sensibly.
- It is advisable to appoint an attorney with knowledge of farm management practices.
- The activities of an attorney are not audited or supervised.
- While there are legal options to recover money from attorneys, if they act inappropriately, there may not be any funds left to recover. As the case study provided demonstrates, the mother had no funds left after 12 months to repay her son.
- While you have capacity, you may revoke the Enduring Power of Attorney at any time.
- If you have lost capacity, then any person may on your behalf apply to the Victorian Civil and Administrative Tribunal (VCAT) to have the Enduring Power of Attorney revoked. VCAT will need to be satisfied that it is in your best interest to have the Enduring Power of Attorney revoked; mere suspicion that the attorney might do the wrong thing is rarely going to be adequate evidence for VCAT.
- The choice of two or more people to act jointly or in a majority can be highly effective in reducing the risk of dishonesty or inappropriate decisions.

### RECORD KEEPING

It is strongly recommended that attorneys keep detailed records of all decisions and activities undertaken in their capacity as an attorney. A separate diary is an excellent option. Attorneys should be in a position to provide an explanation of all transactions completed.

## Financial and Personal Enduring Power of Attorney

A Financial and Personal EPA document allows the attorney to sign on behalf of the principal any document which has a financial connection. This could involve:

- bank account transactions;
- payment of accounts;
- dealings with investments and shares;
- buying and selling property;
- payments for accommodation needs, including a hospital or nursing home; and
- selling existing assets and the purchase of other assets.

The personal side of the EPA can allow an attorney to make decisions about:

- where you live, whether permanently or temporarily;
- whether you attend church;
- whether you give gifts to family and friends;
- who you live with;
- if you should be permitted to work, including details of who with and the type of work;

- consent to any health care that is in your best interest (this contrasts with a Medical Treatment Enduring Power of Attorney, which allows for the consent and refusal of health care); and
- restricting visitors to such an extent as may be necessary in your best interest and to prohibit visits by any person if your attorney reasonably believes that visits by that person would have an adverse effect on you.

For some people, the choice of residence if they lose capacity is a very important matter. In these situations, the appointment of a Financial and Personal Enduring Power of Attorney might be a very sensitive option.

As an example of what can be allowed, it might be the habit of a parent to put \$100 in a Christmas card for each of their adult children. If the parent lost capacity to make decisions, the attorney is permitted to send a Christmas card on behalf of the principal that encloses \$100. While it is not a decision that is in the best financial interest of the principal, it is allowable. Be aware when making a Financial and Personal Enduring Power of Attorney that it may not come into use for many years, and therefore think long-term when making the appointment.

### **DIRECTION AND CAPACITY**

**Financial transactions can only be made in accordance with the expressed directions of the principal, unless the principal lacks capacity. In the latter situation, these transactions can only be made if they are in the best interest of the principal.**

In general, a person has capacity (or ‘decision-making capacity’) if they understand the nature and effect of a decision when it is explained to them.

More specifically, having decision-making capacity means that you can:

- understand the information relevant to a decision and the effect of the decision;
- retain that information to the extent necessary to make the decision;
- use or weigh the information as part of the process of making the decision; and
- communicate the decision in some way.

For a person to have capacity to make a Power of Attorney, the person must understand the nature and effect of making that Power of Attorney. For example, in relation to an Enduring Power of Attorney (EPA), the person must understand (among other things) that the EPA continues even if they no longer have decision-making capacity for the matters covered by the EPA, and that during that time they will not be able to effectively oversee their attorney’s use of the EPA.

## **Medical Treatment Enduring Power of Attorney**

A Medical Treatment Enduring Power of Attorney provides your nominated ‘medical agent’ with the ability to either consent to or refuse medical treatment on your behalf. For most people, if they have not documented a Medical Treatment EPA, then their spouse, or nearest relative becomes the person able to consent to medical treatment. This may or may not be the best choice, and therefore it is important that you have appointed a ‘medical agent’ within a Medical Treatment EPA.

Every adult has the right to consent to or refuse medical treatment. If you are unable to make these decisions due to being unconscious or lacking capacity, a doctor can obtain expressed direction from the medical agent named in your Medical Treatment EPA.

Your medical agent is given the responsibility of advising the doctor of the decision that you would probably make if you were able to give appropriate directions to the doctor yourself.

Your medical agent cannot refuse palliative care, which is the provision of pain relief and sustenance. However, for example, where it is necessary to be fed by way of an intravenous tube, this is considered to be a medical treatment and your agent can refuse such treatment if they believe it would not align with your wishes.

Sometimes the decisions to be made by your medical agent can be harrowing and extremely emotional. Consequently, when making a Medical Treatment Enduring Power of Attorney it is important that you discuss what your likely wishes would be with your medical agent in advance. This can be difficult when you are fit and well and have no medical problems, so it is easier and useful to discuss hypothetical scenarios. Once you have made a Medical Treatment Enduring Power of Attorney it would be reasonable to have ongoing discussions with your medical agent from time to time, particularly if any illnesses develop.

**Every adult has the right to consent to or refuse medical treatment. If you are unable to make these decisions due to being unconscious or lacking capacity, a doctor can obtain expressed direction from the medical agent named in your Medical Treatment EPA.**

## Prescribed forms and procedures for signing documents

Each of the Financial, Personal and Medical Enduring Powers of Attorney has prescribed forms which must be used. Significantly, there are restrictions about the witnessing of these documents. One important obligation is that at least one of the witnesses must be a person who is eligible to witness affidavits or a medical practitioner, and both witnesses must certify that you have decision-making capacity in relation to the document.

It is therefore essential to discuss these important documents with a lawyer and have the lawyer prepare them so you can be assured they are valid. The information provided in this guide is general in nature and should not be relied upon as legal advice. You should speak to a lawyer about your circumstances. □

## FREQUENTLY ASKED QUESTIONS

### Are there any actions that an attorney cannot take?

There are some matters that an attorney cannot undertake. These include:

- Making a new Will for the principal
- Having access to the Will unless they can demonstrate that there is a good reason. For example, the attorney may be planning to sell the residential property to pay for nursing home accommodation fees. It would be reasonable for an attorney to look at the Will to ascertain whether there was a specific gift in the Will in respect of the house. An attorney is not entitled to take possession of the Will.
- Undertaking tasks related to positions held by the principal that are personal. For example, a director of a company cannot delegate to their attorney the role of making decisions in respect of the company.
- Making decisions for the principal in their capacity as a trustee or a trust or superannuation fund. In that situation, very specific attention should be given to the Trust Deed to ascertain the suitable options.

### Are attorneys entitled to payment for their role?

An attorney is not entitled to remuneration unless it is specifically authorised in the EPA by the principal.

### When does an Enduring Power of Attorney end?

Various events bring an Enduring Power(s) of Attorney to an end. For example, the EPA will no longer be effective when you revoke it, or when you die.

## CHECKLIST

- Do you have a Financial and Personal Enduring Power of Attorney?
- Is your attorney aware of their obligations?
- Are you confident your attorney will act responsibly?
- Do you want a joint, majority or individual attorney?
- Do you have a Medical Treatment Enduring Power of Attorney?
- Have you discussed your medical treatment wishes with your family and your attorney?

## USEFUL RESOURCES

**Law Society of South Australia**, [www.lawsocietysa.asn.au](http://www.lawsocietysa.asn.au)

**South Australian Civil and Administrative Tribunal**, [www.sacat.sa.gov.au](http://www.sacat.sa.gov.au)

**Law Society of Tasmania**, <https://lst.org.au>

**Magistrates Court of Tasmania**, [www.magistratescourt.tas.gov.au](http://www.magistratescourt.tas.gov.au)

**Law Institute of Victoria**, [www.liv.asn.au](http://www.liv.asn.au)

**Victorian Civil and Administrative Tribunal**, [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au)

## MORE INFORMATION

**O'Farrell, Robertson and McMahon Lawyers Enduring Powers of Attorney Guide**, [www.ofrm.com.au/epaguide](http://www.ofrm.com.au/epaguide)

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