



# STRUCTURING & ESTATE PLANNING IN BRIEF

MACGILLIVRAYS

S O L I C I T O R S



## TO ENDURE OR NOT TO ENDURE

A Power of Attorney is a legal document that provides authority for another person to make decisions about matters on your behalf. The decisions that your attorney makes for you will have the same legal force as if you had made them yourself.

### There are two types of Power of Attorney:

- a general Power of Attorney, and
- an Enduring Power of Attorney.

It is important to distinguish between the two types and the particular circumstances in which they should be used.

### WHAT IS A GENERAL POWER OF ATTORNEY?

A general Power of Attorney is a legal document which allows you to appoint someone (an attorney) to have the legal power to make decisions about matters on your behalf. For example, if you are planning an overseas trip and need someone to make **financial decisions** on your behalf while you are absent, then a general Power of Attorney would be appropriate. This is a **limited power** and will come to an immediate end if for some reason you lose capacity to make decisions. A general Power of Attorney cannot be used in respect of decisions regarding personal/health matters.

### WHAT IS AN ENDURING POWER OF ATTORNEY?

An Enduring Power of Attorney is a legal document which allows you to appoint someone (an attorney) to have the legal power to make decisions about matters on your behalf.

'Enduring' simply means that the power continues even after the person giving it loses capacity to make decisions. This means your attorney can continue to act for you if you lose capacity to act for yourself and for this reason, great care needs to be taken when choosing an attorney.

An Enduring Power of Attorney can be used to give your attorney power to make decisions regarding **financial matters**, as well as **personal/health matters** including whether to consent to particular types of health care. It is important to note however, that some types of decisions can not be made by your attorney. For example, you cannot give your attorney power to make decisions regarding your Will, voting in elections, consenting to adoption or marriage, or the donation of body tissue.

### COMMENCEMENT

A Power of Attorney, whether general or enduring, does not have to take effect immediately. In relation to financial matters the attorney's power to make decisions may begin immediately, on a specified date or on a specified occasion. In relation to personal/health matters the attorney's power to make decisions does not begin until you are incapable of understanding the nature and foreseeing the effects of a decision, and of communicating that decision.

### REVOCAATION

A general Power of Attorney may be revoked at any time and will be automatically revoked if you lose capacity. An Enduring Power of Attorney may also be revoked at any time so long as you have capacity, so that you are capable of understanding what you are doing. There are several other circumstances which will cause automatic revocation to either type, these include if you die, if your attorney withdraws, if your attorney becomes incapable, if your attorney becomes bankrupt or insolvent, or if your attorney dies. An Enduring Power of Attorney may also be revoked if you marry or divorce. This will depend on whether or not your spouse is your attorney.

**A Power of Attorney can be drafted quickly and with minimal cost. Whilst individual circumstances determine need for a general Power of Attorney, we believe it is advisable to have an Enduring Power of Attorney.**

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# SPECIAL DISABILITY TRUSTS



**On 20 September 2006 the federal government amended both the Social Security Act 1991 and the Veterans' Entitlement Act 1986 so as to provide for the establishment of Special Disability Trusts.**

In a move that is designed to provide relief for persons with severe disabilities and their families, the amendments create exceptions to the ordinary means tests that apply to trusts. In particular, a special disability trust may have assets of up to \$500,000, as well as the home in which the principal beneficiary resides, before the means tests will apply thus ensuring that the social security benefits of those with severe disabilities are not unduly reduced by the existence of a trust.

The requirements of a special disability trust, however, are very specific. To qualify the trust must:

- comply strictly with the Social Security Act 1991 or the Veterans' Entitlement Act 1986, as applicable, and any associated department determinations; and
- be established for the sole purpose of providing care and accommodation for a person with a severe disability.

## WHO IS A PERSON WITH A 'SEVERE DISABILITY'?

A person with a severe disability is someone over 16 who:

- has an impairment which would entitle them to Disability Support Pension (Social Security Act) or invalidity service pension or invalidity income support supplement (Veterans' Entitlement Act);
- because of their disability, is not working, and is not likely to work, at relevant minimum wages; and either:
  - lives in an institution, hostel or group home that provides care for people with disabilities and for which funding is provided (wholly or partly) under an agreement between the Commonwealth, the States and the Territories; or
  - has a disability that would, if the person had a sole carer, qualify the carer to receive Carer Payment or Carer Allowance.

A person under 16 may be a person with a severe disability if they are a 'profoundly disabled child' under the Social Security Act.

## TRANSITIONAL PROVISIONS

Until 30 June 2007, the trustee of a trust settled before 20 September 2006 may apply to have the trust treated as a special disability trust. It is important to note however, that while such exemption may be provided unconditionally, it is likely that to qualify the trust would require amendment, for example, so as to align it with the intention of the legislation.

**A special disability trust should only be established in consultation with your solicitor.**

PLEASE NOTE: This newsletter is not legal advice and our comments are of a general nature only. This document is not to be relied on as substitution for proper detailed advice. If you would like to be removed from, or added to our mailing or emailing list, contact Rachel Connors on (07) 3221 4550 or [rachelc@macgillivrays.com.au](mailto:rachelc@macgillivrays.com.au)

# SIMPLIFIED SUPER - SOON TO BE A REALITY

**On 21 December 2006 the federal government released the long awaited draft regulations on pensions and annuities which form part of the Government's Simplified Superannuation reforms.**

The draft regulations provide new simplified standards for pensions and annuities, as well as changes to the payment rules for superannuation benefits including:

- Removal of the requirement for compulsory cashing of superannuation benefits for people over the age of 65 from 1 July 2007;
- Tax-free distributions from taxed super funds for people over the age of 60; and
- Revised rules for the payment of superannuation death benefits.

## TRANSITIONAL ARRANGEMENTS

Under the new system post-tax contributions (i.e. contributions paid from after-tax income) will be capped at \$150,000 a year. A transitional cap of \$1 million, however, will apply to post-tax contributions made between 10 May 2006 and 30 June 2007.

# DO YOU HAVE A WILL? IS IT THE RIGHT WILL FOR YOU?

**Every person over the age of 18 is entitled to have a Will and should have one. If you do not make a Will your estate may be distributed in accordance with what are known as the Rules of Intestacy and not in accordance with the way you would like your estate to be divided. You should also have a Will so that you can nominate who will take charge of your affairs when you die.**

Various reasons are often cited as justification for the postponement of making of a Will but consider the following:

- Although you may not consider your estate to be large enough to warrant having a Will, your circumstances may change overnight. For example, you may receive an unexpected benefit under another person's Will which could result in a substantial increase in the size of your estate.
- You may consider a Will unnecessary because you hold most of your property as joint tenants with say, your wife, and therefore upon your death the survivor would automatically take that property. However, that joint tenant may unexpectedly die leaving you as the surviving joint tenant and the owner of substantial assets that should be the subject of a Will.
- Another reason to have a Will drawn now is that if you attempt to execute a Will when you are of unsound mind and understanding or lack capacity, the Will may be challenged and treated as invalid. However, if you make a Will whilst you are in good health it will be valid and binding even though your capacity may be affected by a later accident or other event that may affect your mental capacity such as the onset of Alzheimers disease.

We also recommend that you review your Will regularly, especially if any of the following events occur:

- **If you become involved in a new business, company or trust;**
- If change your name or anyone named in the Will changes their names;
- If any executor dies or becomes unwilling or unsuitable to act due to ill-health, age or any other reason;
- If a beneficiary dies;
- If specific property has been left to a specific beneficiary and you subsequently sell that property or it changes in nature;
- If your family situation changes or that of any beneficiary changes (eg. marriage, divorce, matrimonial problems, children or further children, de facto relationships);
- If you take up permanent residence in another State or overseas.

**Should you require further information with regard to any aspect of your estate planning, please contact us - MacGillivrays Solicitors - 1300 369 581.**