Does my company need a power of attorney?

Read on for answers

Coastal *Law Group*

WELCOME

Hi there!

So, you've set up your company, you're running your business, and keeping on top of all that running a business entails (which we know is a lot!). But have you stopped to consider what would happen to your company if you lose capacity or die?

If you have never considered this, you are not alone. Most people focus on the positives (like being successful!), and not on the possibility of disaster striking.

The good news? Putting a plan in place for 'if' the worst should happen, is easier than you'd think.

This guide explains what a company power of attorney is, when a company power of attorney can be used, and why having a company power of attorney is a great idea.

We hope it helps!

Coastal Law Group

Disclaimer: This guide is not legal advice and is not to be relied on as legal advice. This guide contains information of a general nature only. Ensure you obtain appropriate legal and taxation advice prior to implementing an estate plan.

Running a business means planning for more than just today.

A professionally prepared company power of attorney gives your company the flexibility to authorise trusted people to sign documents, complete transactions, and make decisions on the company's behalf when required.

It's a simple but powerful way to help protect business continuity and avoid unnecessary delays.

At Coastal Law Group, we make the process straightforward.

We'll explain your options in plain English, tailor the document to your company's circumstances, and ensure you have the confidence that your business can continue operating when it matters most.

TOPIC ONE:

What is a company power of attorney?

01 A company power of attorney gives an individual (or individuals) the authority to act on behalf of a company, where the sole director, or all directors, are unable to act due to death or incapacity (or even where they are overseas!).

02 The individual (or individuals) appointed under a company power of attorney are known as the 'attorney' (or 'attorneys').

03 The terms of a company power of attorney are flexible and can be tailored to your circumstances and your company. For example, the company power of attorney can include terms that state that:

- the attorney (or attorneys) power can start immediately, on a specific date, or upon the happening of an event (such as your loss of capacity or death); or
- the attorney (or attorneys) can exercise all powers conferred upon the director (or directors) of the company or the attorney's (or attorneys') powers can be limited, so that they can undertake only certain actions.

04 It is important that a company power of attorney is prepared so that it is consistent with the company's Constitution and Shareholders Agreement (if applicable). This ensures that the company power of attorney complies with the company's governance documents.

05 A company power of attorney can be invaluable particularly for sole director companies. When a sole director dies, there can be a number of practical and legal steps involved to have a replacement director appointed, which takes time. Should a sole director die, especially unexpectedly, this can put any business being run by the company into significant operational uncertainty. Having a company power of attorney means that there is an attorney (or attorneys) that have the required authority to keep the business going until the longer term succession plan for the company is implemented.

TOPIC TWO:

When would a company benefit from having a power of attorney?

01 Having a company power of attorney is beneficial for a company when a director (or all directors) are unable to fulfil their role as a director, whether due to unavailability (such as being overseas), loss of capacity or death.

02 Where there is no director available to act on behalf of a company, a duly appointed attorney (or attorneys) can step in and make decisions for the company.

03 The decisions that an attorney (or attorneys) can make will depend on the specific terms of the company power of attorney. The attorney (or attorneys) will typically be empowered to make decisions relating to:

- processing payroll;
- paying bills;
- entering into contracts;
- buying and selling assets;
- managing business operations; and
- hiring and dismissing employees.

TOPIC THREE:

What happens to my company if I die or lose capacity and don't have a company power of attorney in place?

01 What happens to a company if you die or lose capacity will vary, depending on your role in the company.

02 If you are a **director** of a company, and **die** or **lose capacity**, then:

- your appointment as a director ceases immediately; and
- the process for appointing a replacement director will depend on the company's Constitution and the Corporations Act 2001 (Cth). In many cases, the shareholders or your executor or administrator (being the person (or persons) in charge of your estate) will need to take steps to appoint a replacement director.

03 If you are a **shareholder** in a company, then:

- If you **die:**
  - the shares you own in the company will be gifted under your Will (if you have one) or in accordance with legislation;
  - your executor or administrator will generally exercise the rights attaching to your shares during the administration of your estate, until your shares are transferred to the beneficiaries entitled to receive them; and
  - your executor or administrator can typically make some decisions prior to your estate being finalised, but often this is possible only once a Grant of Probate or Letters of Administration has been obtained.
- If you **lose capacity:**
  - your shares will be held and controlled by the attorney (or attorneys) you have appointed under your Enduring Power of Attorney for financial matters (if you have put one in place!); and
  - your attorney (or attorneys) can 'step into your shoes' and can generally exercise the rights attaching to your shares, subject to the terms of your Enduring Power of Attorney and their duty to act in your best interests.

04

An attorney (or attorneys) appointed under a company power of attorney are appointed by the **company**, which means that their authority can be excercised whether you have lost capacity or died, as the **company** continues to exist even after your death. When and how an attorney (or attorneys) can act on behalf of a company will be determined by the specific terms of the company power of attorney.

EXAMPLES

How a company power of attorney can help

Unexpected Illness or loss of capacity

Scenario 1

Imagine you run a successful retail business.

You unexpectedly require emergency surgery and remain in hospital for several weeks.

While you are recovering, the company needs to sign a new lease, renew insurance policies and authorise several important payments.

Without someone authorised to act for the company, these matters may be delayed, disrupting the company's operations and potentially exposing the company to financial loss or operational disruption.

A company power of attorney gives your appointed attorney (or attorneys) authority to attend to these matters promptly, ensuring the business continues operating and remains adequately insured while you recover.

Scenario 2

Imagine you own a successful family business.

You are unexpectedly hospitalised after suffering a stroke and are unable to communicate or make decisions for several months.

Staff still need to be paid, customer contracts need to be signed, and the business must continue operating.

A company power of attorney can authorise an individual (or individuals) you trust to make decisions on behalf of the company, ensuring the business continues running (while you focus on your recovery!).

Scenario 3

Imagine your company owns several commercial properties.

The company has signed a contract to sell one of the commercial properties. After signing the sale contract, you unexpectedly lose capacity.

Loan documents still need to be signed, settlement instructions must be provided, and urgent repairs need approval (and they must be done before settlement!).

Without someone authorised to act, the transaction could be delayed, potentially resulting in significant financial consequences for the company.

A company power of attorney can allow the company’s appointed attorney (or attorneys) to complete these transactions and protect the company's interests.

Death of a Sole Director

Scenario 1
Imagine you are the sole director and shareholder of a company that operates a thriving business.

You unexpectedly pass away.

Your family wants to continue operating the business, but no one has authority to sign contracts, access company accounts, or deal with suppliers while a replacement director is being appointed. This puts the business, and your family, in limbo.

A company power of attorney can provide immediate authority for your chosen attorney (or attorneys) to keep the business operating until the company's longer-term succession arrangements are implemented.

Scenario 2
Imagine you are the sole director of a company with several long-term commercial contracts.

You unexpectedly pass away shortly before an important contract renewal can be finalised.

Without anyone authorised to act for the company, the renewal cannot be signed, putting a valuable client relationship and future income at risk.

A company power of attorney can enable your appointed attorney (or attorneys) to continue dealing with customers, negotiate contracts, and keep the business operating until a replacement director is appointed.

Scenario 3
Imagine you are negotiating the sale of your business when you unexpectedly pass away.

The buyer still wants to proceed, but there is no director available to sign documents, answer requisitions, provide instructions or authorise the completion of the transaction.

Without someone authorised to act for the company, the sale may be delayed or even fall through. By the time a replacement director is appointed, the buyer may no longer be interested or may want to renegotiate the commercial terms of the sale (to their advantage!)

A company power of attorney can allow your appointed attorney (or attorneys) to perform any actions on behalf of the company to ensure that the sale of the business can be finalised.

Travelling Overseas

Scenario 1

Imagine you're overseas but your flights get delayed due to severe weather and you can't return to Australia for another week.

Your company is due to settle on the purchase of a commercial property in five days.

Loan documents still need to be signed (the lender approved finance at the last minute!), settlement documents must be signed, and final instructions provided before the settlement date.

Without someone authorised to act on behalf of the company, settlement may be delayed, potentially exposing the company to penalty interest or even termination of the contract.

A company power of attorney can provide your appointed attorney (or attorneys) with the authority to complete the transaction on behalf of the company, ensuring settlement proceeds on time.

Scenario 2

Imagine you are the sole director of your company.

You are travelling overseas on a well-earned family holiday.

While you're away, your company is offered the opportunity to secure a significant new client, but the contract must be signed within 48 hours.

Without someone authorised to act on behalf of the company, the opportunity may be lost.

A properly drafted company power of attorney can allow your appointed attorney (or attorneys) to sign the contract on the company's behalf, ensuring your business can seize important opportunities even when you are overseas.

Scenario 3

Imagine you, along with the only other director of the company, are travelling overseas for an important conference.

One of your company's largest customers places an urgent order.

In order for the order to be placed, you require the supply of materials from one of your suppliers. Your supplier won't deliver the materials without a signed supply agreement in place.

Without someone authorised to execute the supply on behalf of the company, the company may be unable to fulfil the order. This puts the company's relationship with their largest company at risk

A company power of attorney allows your appointed attorney (or attorneys) to sign the supply agreement promptly, helping your business secure valuable work even while you are overseas.

KEY TAKEAWAY

Whether you're **overseas**, temporarily or permanently **lose capacity**, or **pass away**, your company may still need to:

- process payroll;
- pay bills;
- enter into contracts;
- complete settlements;
- operate bank accounts; or
- make day-to-day business decisions.

A properly drafted company power of attorney helps ensure that an individual (or individuals) you trust has the authority to keep your business operating when you can't.

TOPIC FOUR:

*So does my company **need** a company power of attorney?*

01 A company power of attorney is a powerful document that ensures continuity for your company's business operations.

02 Most trading companies can benefit from implementing a company power of attorney, however, it is companies that operate businesses that can often benefit **most** from having a company power of attorney in place.

03 If your company needs to do any of the following, a company power of attorney is strongly recommended:

- pay wages;
- pay bills;
- sign contracts; or
- hire or fire employees.

04 If you are a sole director of a company or all the directors of the company frequently travel (whether for business or pleasure!), a company power of attorney can also be very beneficial, as it ensures there is always someone with the authority to act on behalf of the company.

05 If, however, your company is a passive entity, perhaps only in existence to hold assets, then a company power of attorney offers fewer benefits, although there may still be circumstances where having one is worthwhile.

HAVE QUESTIONS?

Get in touch with us, we'd love to help!

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