

SAMPLE SMSF ENDURING POWER OF ATTORNEY AND INDEMNITY LETTER

This letter may be used to recommend to clients to create or update their enduring powers of attorney to specifically include a replacement SMSF Trustee

**IMPORTANT INFORMATION ABOUT THIS DOCUMENT**

This document or the text contained within it does not constitute legal advice. Examples in this text are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. It is your sole responsibility to determine the suitability of the advice you are providing to your client.

**This is not an advice document.**

This letter has been designed to encourage clients to review and update their Enduring Powers of Attorney to specifically cater for superannuation trusteeship. This may include a complete EPOA over health and finances but more importantly focuses on the person who may take over as the member’s trustee or director of the fund’s corporate trustee in the event of incapacity or choice by the member to no longer take on the legal responsibility of trustee.

**WARNING:** *Where a member becomes incapacitated and does not have an EPOA, trusteeship cannot pass unless the Court appoints a legal personal representative but if this does not occur within 6 months then the member must leave the fund as they are not able to be a trustee or director and thus the SMSF definition is not met.*

**Importantly the path to EPOA and SMSF success starts with a conversation with the client.**  For that we have prepared this letter – *EPOA Review urgently required* – a strong word about compliance, continuity in the Fund and the Commissioner of Taxation’s requirements. Remember also that the fee payable by the Trustee for the preparation of the EPOA is tax deductible.

From a legal perspective the EPOA forms used by LightYear Docs have been prepared from relevant State government material and reviewed and signed off by Abbott & Mourly lawyers so there is no legal professional privilege issues in producing the EPOAs for your client.

**Legal Sign Off Option**

If you would like to book in a time for a client/adviser face to face meeting with a lawyer to discuss, finalise and provide specific legal sign off then please contact [info@abbottmourly.com.au](mailto:info@abbottmourly.com.au) to book a time. The fee for a 30 minute consultation is $295 but you may want to bundle it up into a one hour session - $495 where EPOA, Wills and TTs prepared on the LightYer Docs platform can be reviewed and signed off by Abbott & Mourly lawyers.

You may reproduce all or any part of this text in hard copy and/or in electronic format, without asking for permission from LightYear Docs.

Adviser/Accountant Name

Firm Name

Address

City, State, Postcode

Date

Client Name

Address

City, State, Postcode

Dear Mr./Ms. [Client Name]:

**URGENT: The Importance of an SMSF Enduring Power of Attorney for your Fund in addition to a normal EPOA**

We are writing to all our SMSF clients on the importance of having, firstly an enduring power of attorney (EPOA) in the event something happens to you so someone can take over your financial decision making and, secondly, to act as a trustee on your behalf in the a SMSF if you are no longer legally able to perform this role or alternatively you no longer wish to act as a trustee or director of the trustee company.

You may not be aware that many standard EPOA’s may only apply to financial and property matters if you suffer a legal incapacity and may not be applicable to the management of your SMSF in other circumstances.

When it comes to managing your SMSF the EPOA needs to act as either a direct trustee or as a director of the trustee company on your behalf. This may occur when you suffer a legal incapacity however it may also occur when you decide to hand this role over to someone else i.e. your attorney.

To solve this dilemma it is advisable to have a separate EPOA specific to the fund trust deed and corporate trustee constitution.

**SMSF Trustee Requirements**

It is important at all times for your superannuation fund to remain as a compliant SMSF as defined in section 17A of the SIS Act 1993. That means all members must either be trustees or directors of the funds corporate trustee. In the event that this standard is breached the SMSF must windup and all assets need to be transferred to a non-SMSF superannuation fund.

This is could be expensive and costly exercise however the penalty for failing to do so may be significant.

**Exception for non-trustee members**

In real life there are certain members who shouldn’t be trustees of the Fund such a situations where:

* Fund members are living overseas;
* Fund members who have dementia, early onset Alzheimer’s or whose cognitive ability is impaired;
* Fund members who do not want to take on the legal responsibility of acting as a Trustee of a SMSF.

In these situations, these people need to appoint a legal representative (a specific SMSF EPOA) to act as trustee or director of the trustee company on their behalf.

**The SMSF Replacement Trustee for Members**

A member of a SMSF is allowed to nominate a replacement or substitute Trustee or director of the fund’s corporate trustee. This person may not even be member of the fund, to act as their enduring power of attorney.

The enduring power of attorney needs to specifically state that it provides the attorney with the power to become a replacement trustee and from a date when the member seeks to no longer act as a Trustee for one or more of the reasons noted above.

**As your SMSF adviser** we strongly recommend that together we undertake a simple four step process to implement your specialised SMSF EPOAs:

1. Review any current EPOA of fund members.
2. Update or create an EPOA with specific SMSF replacement trustee rules.
3. Consider any members who many want to put in place a replacement trustee to absolve them of the legal responsibilities of acting as a trustee.
4. Review of the Fund’s trust deed to ensure it has the ability to implement the SMSF EPOA replacement trustee strategy.

We can provide the above four step review for all members of the Fund and if need be update the Fund’s deed for no cost if it falls short, for <$350> per member EPOA. We believe it is important to complete this task immediately to provide stability, certainty and security if something happens to a member of the Fund. This also provides the opportunity for a member to stay in the Fund and not be a Trustee, if they choose an alternative person to act as their replacement trustee.

We ask that you tick one of the boxes below on this matter so that we can take appropriate action on your behalf:

* We hereby wish to proceed with the SMSF EPOA review and preparation of a specialised EPOAs for members of the Fund. We shall invoice the Fund <$350> per EPOA for this service;
* No EPOA required but importantly for our adviser, we hereby disclaim all liability for damages, costs and any fines for our professional SMSF advisers in relation to any actions or consequences of not being able to put in place a replacement trustee.

As time is of the essence can you please let us know whether you would like to go ahead or are happy to leave the Fund’s trustee status as is by completing the acknowledgement below.

And to get things started we have attached a simple questionnaire that addresses these issues.

Signed:

**Trustee of the Fund on behalf of all Members of the Fund**

Sincerely,

Name of Professional

**Enduring Power of Attorney**

1. **Who is the Attorney**
2. Who is to be your attorney? This may be held jointly by one or more persons:

|  |
| --- |
|  |

1. In the event that none of your attorneys hold capacity or are alive who is to be your second attorney? This may be held jointly by one or more persons. If you don’t want a second line of attorneys just put “NA”

|  |
| --- |
|  |

1. In the event that none of your attorneys hold capacity or are alive who is to be your third line of attorneys? This may be held jointly by one or more persons. If you don’t want a third line of attorneys just put “NA”

|  |
| --- |
|  |

1. Attorney for What?

Choose which area that you would like your attorney to act for you for. They hold complete power unless you provide terms and conditions and for financial or acting as your superannuation trustee you must also choose when the attorney power is to start.

1. **Financial** – this provides your attorney with the power to sign contracts for the sale of your property or shares, manage your accounts and do all things financial.

Are there any conditions or terms?

|  |
| --- |
|  |

When is the financial attorney to start;

* Upon signing of the enduring power of attorney
* When I am no longer able to make decisions for myself

1. Superannuation – this provides your attorney with the power to act as your trustee or director of your company trustee where you have a self-managed super fund?.

Are there any conditions or terms?

|  |
| --- |
|  |

When is the financial attorney to start;

* Upon signing of the enduring power of attorney
* When I am no longer able to make decisions for myself

1. Health and Illness – this provides your attorney with the power to make decisions are your health care in the event of illness. They may be the same as the Financial attorney or they may be a different person. If they are different to your financial attorney place their names below but if not just say “NA”. Their commencement arises at the time of you no longer being capable of looking after yourself.
2. Who is to be your health and illness attorney? This may be held jointly by one or more persons:

|  |
| --- |
|  |

1. Are there any conditions or terms?

|  |
| --- |
|  |