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State laws complicate incapacity rules

by Todd Wills and Matthew Burgess

When preparing for the incapacity of an SMSF trustee, practitioners must be aware of the legislative requirements of each state and territory where the fund may hold assets or interests.

SMSF advisers and trustees must be aware of the need to ensure an enduring power of attorney is applicable in all jurisdictions in Australia when preparing documentation for a potential incapacity event as the relevant legislation varies greatly in each state and territory, according to a superannuation lawyer.

View Legal director Matthew Burgess noted that while the superannuation legislation operated exclusively at a federal level, the difficulty in aligning it with the rules regarding incapacity stemmed from the fact they function at a state or territory level.

“You’ve got every single state and territory running a completely unique regime across these sources of documentation that might be relevant in the context of an SMSF and that might be relevant in the context of someone losing capacity,” Burgess told attendees at an Institute of Financial Professionals Australia webinar recently.

As the level of documentation required by state-based legislation differed depending on the location, he advised SMSF practitioners to be mindful of the jurisdictions that may apply to their clients’ circumstances when preparing for incapacity.

“Our basic position is that wherever you’ve got asset registers, particularly landholding registers, our preference is that you would have an enduring power of attorney in each jurisdiction,” he said.

“Is that the law? The answer is it’s not the law, but our experience is that it can just be ridiculously painful if you adopt any other approach.

“In New South Wales, the enduring power of attorney [document] in that state is on average less than six pages long. Compare that to the Victorian and the Queensland documentation, those documents run to over 20 pages generally.”

He provided an example to illustrate the potential challenges practitioners may encounter when advising clients dealing with an incapacity event with interests or assets spread across different states and territories.

“[For example], if you’ve got someone based in New South Wales and they’ve got an apartment down in Melbourne that they go and visit and they’ve lost capacity,” he said.

“In a practical sense, if you’re [turning] up as their attorney to the Victorian titles office to take steps, you’re immediately going to be hitting practical issues because they’re going to be expecting to see a 25 or 30-page document and you’re going to [turn] up with your New South Wales document that’s lucky to be half a dozen pages.

“So as a general rule we would normally recommend that you get a different enduring power of attorney in each state where you might potentially need it.”