

EPOAs compromised by state laws

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Differences in the legislation of each Australian state can significantly impact the effectiveness of an EPOA an SMSF has in place.

A legal specialist has warned the difference in state-based law has to be taken into account in order to ensure the effectiveness of an enduring power of attorney (EPOA) in situations where the assets of an SMSF are held across several different domestic jurisdictions.

View Legal director Matthew Burgess noted in theory there should not be an issue in these circumstances because of the way the law is written.

“[For example,] even though there are a whole lot of [specific conditions] in New South Wales and a whole lot of [different specific conditions] in Victoria, [the state laws] are meant to cross-acknowledge each other so you’re not meant to have any problems. That’s the strict legal position,” Burgess acknowledged.

However, he pointed out practitioners may not be able to rely on this provision from a practical perspective and need to go to greater lengths to ensure the desired outcome is achieved from the decision to put an EPOA in place.

“[But] practically what we’re finding [with SMSF assets], [and] I’m primarily looking at real property assets here [because we are not finding as] big a problem in relation to equities, that if a fund has real property assets in more than one jurisdiction, or [it’s a situation] where the members are mainly based in one jurisdiction but [the fund] happens to own property in another jurisdiction, we’re finding that it is basically compulsory to set up an enduring power of attorney in each jurisdiction,” he noted.

“Now that sounds like a whole lot of extra work and a whole lot of lawyers making an unnecessary amount of money, [but] counterintuitively we’re actually finding that to be the best outcome and in fact the cheapest outcome in normal circumstances.

“[That is] because the hassle involved in trying to convince a different state-based authority that the enduring power of attorney sitting in front of you right now, and been lodged, is in fact valid becomes [in a practical sense] a nightmare.”