



## Can you limit the scope of your Power of Attorney?

**Appointing someone as your Attorney is an important consideration in the overall structuring of your legal affairs. This appointment also has significant ramifications for the management of your affairs in the future.**

### **What is a Power of Attorney?**

The purpose of a Power of Attorney is to allow you (the Donor) to confer upon someone you trust (the Attorney) the legal authority to look after your affairs. Powers of Attorney are granted for a variety of reasons. Often, this includes the ability to act on your behalf if you are away for an extended period of time, or when you reach the stage in life where you need someone to manage your financial situation.

### **Limiting your Power of Attorney**

Some people feel uneasy about granting an unlimited Power of Attorney. In some cases they are anxious about the extent

of the Power they are conferring upon someone else. Alternatively, they may not have anyone in their circle of acquaintance with the competence to undertake this significant responsibility. However, what many people do not realise is that you can limit the powers and scope of your Power of Attorney. With the aid of your lawyer, it is possible to specify conditions, limitations on, or instructions about the extent of the Power that you give to your Attorney, or even when that Power is exercisable.

### **What happens if the Attorney acts contrary to my wishes?**

When an Attorney acts within the scope of their Power, they are protected vis a vis their Donor and any other person. What is not so well known is that the use of a Power of Attorney contrary to the known wishes and directions of the Donor is a breach of trust. The fact that the Donor made it clear to the Attorney that they did not wish the power to be exercised, or to act only in a stated way, is sufficient to constrain the Attorney legally.

This does not ordinarily mean that an Attorney needs to seek the permission of the Donor before acting in accordance with the Power. However, if the Donor gives specific instructions, including that the Power has been revoked, the Attorney is obliged to follow those later instructions.

### **What should I do?**

When organising your legal affairs, due consideration should be given to utilising Powers of Attorney. Should you wish to limit or define the scope of your Power, our lawyers are able to assist you with drafting a Power that will legally reflect your wishes.

*For further information on this topic, please contact Peter Weller at [pweller@tde.com.au](mailto:pweller@tde.com.au)*

**Tolhurst  
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Lawyers

# Wills, probate and the administration of estates and trusts

## Why you should have a Will and when should you review it?



**As the saying goes, “there are only two certainties in life – death and taxes.” Just as you see to your financial affairs, it is imperative that you also get your affairs in order for the eventuality of your death. This means that it is of the utmost importance to have a valid will.**

### Why should you have a Will?

Everyone over 18 should have a will. In particular, anyone who has children, a business or assets of any description should have a will. A will allows you to determine what happens to your affairs when you die. Without a will you die intestate - and your estate is distributed in accordance with the State's intestacy rules. This means that your estate may go to people who you would not wish to receive your assets. Even if you don't have any assets, you may be entitled to a superannuation death benefit. This may flow into your estate and could be of significant financial benefit to your next of kin.

### When should you review your Will?

Wills should be reviewed at least every 7 years - or upon certain life stages. Such as:

- marriage,
- co-habitation
- divorce or separation
- having a baby or adopting an infant,
- children coming of age,
- becoming a grandparent
- a death in the family – such as a spouse or executor,

- owning a business,
- retirement,
- a change in financial status of yourself or a close family member.

### Who will be your beneficiaries?

Preparing a will forces you to think about who will benefit from your estate. Making proper provisions for your spouse or partner, children, extended or previous family members and friends is an important consideration. If substantial sums are involved, giving thought to an appropriate age for your children to receive their inheritance, may also be worth consideration.

Many people like to make a bequest or legacy to a favourite charity upon their death. The only way to ensure that this will occur is to make provision for it in your will.

### Appointing executors

The selection of executors is a very important decision. Executors are responsible for protecting your assets, paying your debts and distributing the estate in accordance with your wishes. Executors may be family or friends; - alternatively we can undertake the role of executor on your behalf.

Whoever you appoint, it is important that your executors are familiar with financial matters. Don't forget to ask if they are prepared to take on the role of executor. Otherwise you run the risk of them

refusing to act as your executor, leaving the estate without an administrator when you die.

### What About a ‘Home-made’ Will?

Anyone can make a “home-made” will or buy a will kit, but if you use a lawyer you get two benefits. One is that if there is any problem with the will after you die, such as an ambiguity, typographical error, question of testamentary capacity or undue influence, your lawyer has a file that can be referred back to.

The other benefit is that a lawyer can help you to plan a will that produces exactly the right result, whatever the prevailing circumstances when you die. Making a will with a lawyer is not expensive. Engaging a lawyer to fix up a defective will after you die can be very expensive and emotionally onerous for your beneficiaries.

Most people spend their working lifetime, building and nurturing their nest eggs. Taking the time to prepare a will ensures that the assets you have acquired over a lifetime will be distributed as you would wish upon your death. Having a will in place also makes life far simpler for the loved ones that you leave behind.

*For further information on this topic, please contact Ines Kallweit at [ikallweit@tde.com.au](mailto:ikallweit@tde.com.au)*



## Can you get spousal maintenance after divorce?

### What is Spousal Maintenance?

Spousal maintenance provides for financial support to be paid to a former spouse or partner, should circumstances arise where they are unable to adequately support themselves.

Under the law, both parties have an equal duty to support and maintain each other, as far as they can – should a bona fide need exist. Importantly, this obligation can continue even after separation and divorce.

### Is there a timeframe for spousal maintenance claims?

If you think that you have a claim for spousal maintenance, it is important that your application be made to the Court within the relevant timeframe. If you were married, your application must be made within 12 months of the date of your divorce. If you were in a de facto relationship, your application must be made within 2 years of the date of final separation.

### Can a property settlement affect my ability to claim?

The existence of a property settlement can affect your ability to make a claim for spousal maintenance. If you have a property settlement with your former spouse or partner, the chances are that the Court Order or binding financial agreement, which you have entered into will be designed to bring your rights to claim spousal maintenance to an end. However, if you have any doubts as to your eligibility - you should seek legal advice immediately. If no final consent orders have been made, and you have not entered into a binding financial agreement, you may be able to make a claim for spousal maintenance.

### What do I need to prove?

It will be necessary for you to show that you have the need for ongoing financial support - and that you are unable to work or support yourself due to your age, state of health or need to care for children. If you satisfy these requirements, you will then need to show that your spouse or partner has the income or earning capacity to be able to support you.

Unless your spouse or partner has the ability to maintain you, it is not worthwhile to apply for spousal maintenance. This is because the costs of such an application can be as great as the amount that you will ultimately receive. Therefore, it is important to be prudent about whether or not you make a spousal maintenance claim.

### Are there limits on payments?

An order for spousal maintenance will go on indefinitely, - or until there is a change in circumstances whereby you can either work to support yourself or the other party no longer has the capacity to pay. Usually, if you were receiving spousal maintenance as a result of a court order where a property settlement is negotiated, your entitlement to spousal maintenance would be capitalised and calculated as a lump sum to be included in your final settlement.

### What should I do?

***If you feel that you have a claim for spousal maintenance, it is important that you seek legal advice promptly. Our lawyers are able to assist you with this matter.***

## A spousal maintenance case study

Recently, our Family Law Partner, Randall Bradshaw has successfully negotiated a significant claim for spousal maintenance.

### Background

In 1983, Mr A and our client, Ms B, marry. Ms B has been diagnosed with multiple sclerosis prior to the union. In 1998, they separate after 15 years of marriage. In 2000 their property settlement is finalised. Ms B is awarded their combined assets and Mr A keeps his superannuation, agreeing to pay \$500 per week in maintenance to Ms B.

### The scenario changes

By 2007, Ms B's condition has significantly worsened and she is forced to give up her \$35,000 per annum part-time job. In 2009 Mr A loses his job - but receives a redundancy of \$5 million and a further \$4.7 million in superannuation entitlements. In March 2010, Mr A asks the Family Court to suspend the weekly maintenance payments due to his "unemployed" status. However, he continues to purchase "significant" property in the name of his new wife. By April 2010, Mr A finds a new job paying \$1.7 million a year.

### A new claim is filed

By June 2010, Ms B is severely incapacitated and is essentially housebound. She applies to the Court to order Mr A to pay \$120,000 to fund the renovation of her home to provide wheelchair access. After considerable delay from Mr A, the Court learns that his annual income is very significant. In August 2012, the Court rules in Ms B's favour awarding a \$120,000 lump sum to fund renovations, and an increase to \$3,500 per week in maintenance payments. A later appeal lodged by Mr A is dismissed and he is also ordered to pay Ms B's legal costs.

*For further information on this topic, please contact Randall Bradshaw at [rbradshaw@tde.com.au](mailto:rbradshaw@tde.com.au) or Eilish Cooke on [ecooke@tde.com.au](mailto:ecooke@tde.com.au)*



## Superannuation debts and the new Director penalty laws

**There has been a tightening of regulatory control and directorial responsibility to ensure the payment of employee entitlements to Australian workers.**

On June 29, 2012, changes were made to the taxation and superannuation laws to broaden the circumstances in which directors can be liable to pay entitlements such as superannuation. Central to these changes are onerous legal consequences for the directors of companies who fail to comply with taxation and superannuation laws. Therefore, it is important that all company directors are aware of their obligations and ensure that their companies are in full compliance with legal requirements.

### What are the changes?

The changes are designed to protect workers' entitlements by widening the obligations of directors. They include:

- Extending the director penalty regime and the estimates regime to apply to the unpaid super guarantee charge (SGC).
- Ensuring that a director's personal liability for superannuation "pay as you

go," (PAYG) withholding debts cannot be discharged by placing his or her company into administration or liquidation.

- In some instances, making directors and their associates liable for PAYG withholding non-compliance tax (NCT).

### What are the consequences for Directors?

In simple terms, directors can now be held personally accountable for the payment of PAYG withholding and SGC obligations.

Directors of companies that are in arrears with these payments will now be personally responsible for a penalty, equal to the unpaid amount. Non payment of PAYG or SGC obligations may trigger the creation of a director penalty notice. This notice enables the commencement of legal proceedings to recover the penalty amount. However, the penalty can be recovered without a penalty notice via other means – such as withholding of a tax refund.

Newly appointed directors have a period of 30 days before they become liable for penalties. This includes liability for all outstanding PAYG withholding liabilities and any outstanding SGC liabilities that arose after June 30, 2012. Defences exist for directors affected by bona fide cases of sickness, or if it can be proved that all reasonable steps to fix the situation were undertaken.

### What steps should Directors take to protect themselves?

A directorship is a significant undertaking. Before agreeing to be a director, we advise that you examine the accounts of the company to ensure that all PAYG and SGC obligations have been met. If you are in any doubt, is it prudent to obtain professional advice on these matters before you commit to all the responsibilities of being a director.

*For further information on this topic, please contact Paul Webster at [pwebster@tde.com.au](mailto:pwebster@tde.com.au)*

# Practitioner Profile



## Our Partnership

**The backbone of any good law firm is a solid and supportive partnership. Our partners; Randall Bradshaw, Peter Weller, Ines Kallweit and Paul Webster offer clients many decades of experience in their areas of law - as well as providing the expert guidance and management required of our practice.**

### Randall Bradshaw – Partner, Family law

For almost four decades Randall has assisted clients with the broad range of issues that family law encompasses. This includes marriage, de facto and same sex relationships; separation and divorce; division of property, parenting and children's issues, intervention orders and pre nuptial agreements.

As a Family Dispute Resolution Provider, Randall understands the complexities of mediation and the need to assist his clients to achieve a quick and satisfactory outcome. Randall is also skilled at representing the needs of his clients through the Courts.

Randall was a Partner with Doyle & Kerr, prior to their merger with Tolhurst Druce & Emmerson in 2001.

### Peter Weller – Partner, Litigation & Dispute Resolution.

Peter is an experienced litigator who has practised for over 30 years in the areas of business and property law, wills and estates. Peter frequently assists clients with estate-related disputes. Often, these include issues over the validity of wills or family provision claims. He combines a robust advocacy with an appreciation for the preservation of relationships, where possible.

Peter assists his corporate clients with property and business related disputes. He is vigorous in the prosecution of these claims in the context of commercial practicalities, which usually underpin these matters.

Peter was a Partner with Gavan Duffy & King, prior to their merger with Tolhurst Druce & Emmerson in 1998.

### Ines Kallweit-Partner, Wills, Estates and Probate

Ines is an experienced lawyer in the fields of wills and the administration of estates and trusts. She also conducts a significant amount of work in the field of property law. Ines assists clients with issues involving estate planning. This includes advice on testamentary trusts, taxation, superannuation and the protection of

assets. Ines is also well experienced in the administration of complex estates, including those with overseas assets. She is also called upon to assist her clients with estate-related litigation.

In 2008, Ines became an Accredited Specialist in Wills & Estates of the Law Institute of Victoria. She is also fluent in German. Ines was welcomed to the partnership in 2012.

### Paul Webster – Partner, Business & Commercial law and Property law

Paul is an experienced lawyer who assists many commercial organisations and Not for Profit groups with their business, commercial and property-related work. This includes the drafting of commercial agreements, extractive industry and planning work, commercial and industrial conveyancing, leasing, adverse possession and subdivisions. Paul assists our individual clients with their property law requirements, including all forms of conveyancing and lease work, as well as drawing wills, probate and the administration of estates and trusts.

Paul brings a mature, thorough and knowledgeable approach to these matters, frequently conducting detailed and intricate work on behalf of his clients. Paul was welcomed to the partnership in 2010.

## TDE gets to know the Docklands

Over the past two years our firm has invested time in getting to know the Docklands. As the suburb most geographically accessible to our office, it makes sense for us to be a part of the Docklands business community. A member of the Docklands Chamber of Commerce, we are regular attendees at Chamber and networking functions, conducting an increasing amount of legal work for individuals and businesses in the area. Due to this exposure, we are gaining a unique appreciation of the joys and challenges of living, working and operating in one of Melbourne's newest suburbs.

In June, we were pleased to co-host the Docklands Chamber of Commerce networking evening, along with VECCI and AMP. Our partner, Paul Webster, gave a

presentation reminding attendees of the importance of keeping their personal legal affairs in order. The overview also encompassed issues that individuals need to consider in their roles as executives and business owners.

"After nearly 30 years as a solicitor, I regularly see individuals who are excellent business owners and operators, but who neglect their own personal legal affairs – often to their detriment. Every once in a while it is good to have a reminder about the sorts of legal issues you should consider and action in both your private and professional life", Paul said.

Tolhurst Druce & Emmerson also advertise in the *Docklands News*. Each month, a TDE lawyer answers a legal question of interest to the local community. The range of questions illustrates the breadth and depth of expertise to be found at our firm, as well as introducing TDE practitioners to readers of the publication.

"Our Q & A advertising format has been a great way to showcase our ability to the Docklands community. Often, it is difficult for a professional services firm to display its expertise. It is our aim to make ourselves and our abilities more tangible to current and prospective clients," Paul Webster commented.

## Wedding Belles

Two of our staff members have celebrated weddings in recent months. Louise Tolson, a Solicitor in the Litigation & Dispute Resolution department, married her fiancé, Alex, in March at The Boulevard Restaurant in Kew. Rosina Zema, Personal Assistant in the Family Law department, married her fiancé, Mark, witnessed by 260 family and friends in early September. Congratulations Louise and Rose!

## Property Law

### Paul Webster answers your legal questions.

**Q** I am looking at buying an apartment in a high rise complex. What should I do before I buy?

**A** Before entering into an unconditional contract for the purchase of any property you should ensure that your finance is in place, that the building is structurally sound and, most importantly, have the proposed contract checked by your lawyer. Purchasers of high rise apartments should also ask their lawyer to check the owners' corporation documentation and the minutes of any recent meetings. This will ensure that you are fully apprised of any decisions of the owners' corporation, or circumstances at the complex, which may result in additional charges being levied, or may affect the use of the apartment or the common property in the future.

**Tolhurst Druce & Emmerson** Working with individuals, families & business.



**Tolhurst Druce & Emmerson** Level 3, 520 Bourke Street, Melbourne T 9670 0700 [www.tde.com.au](http://www.tde.com.au)

Tolhurst Druce & Emmerson incorporates the firms of Gavan Duffy & King, Doyle & Kerr, Puglisi, Heffey & Pavlidi, Louis S Lazarus, and D Condon & Co. If you wish to change your contact details or no longer wish to receive this publication, please contact our office on (03) 9670 0700.

The information in this newsletter is not intended to be a complete statement of the law relating to the issues raised. Accordingly, no person should rely on this information without obtaining specific advice from lawyers.

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### Tolhurst Druce & Emmerson

Level 3, 520 Bourke Street  
Melbourne VIC 3000  
Telephone 03 9670 0700  
Facsimile 03 9670 8503  
[www.tde.com.au](http://www.tde.com.au)