

POWER OF ATTORNEY
INFORMATION
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What is a Power of Attorney?

It's a legal document that allows you (the Principal) to nominate one or more persons (your attorney) to act for you in legal, financial and property matters while you are alive.

Powers of attorney can be:

- **General:** Only valid while you have mental capacity. You can still personally carry out any of the powers you have given your attorney, such as banking and the sale of a property.
- **Limited:** The power is limited by, for example, time or limited to a specific act.
- **Enduring:** Remains effective after you have lost mental capacity (e.g. you develop dementia, have a stroke or sustain a brain injury). It remains in force until death or until it is validly revoked.

A Power of Attorney cannot be used to make medical or lifestyle decisions. You would need to appoint an enduring guardian in a separate legal document to make these decisions.

Do I need an Enduring Power of Attorney?

If you own assets and lose mental capacity, someone will need to be appointed to look after your affairs.

If you have not granted an Enduring Power of Attorney to the person of your choice, someone (e.g. your spouse, child or next of kin) may need to apply to the Supreme Court or NSW Civil and Administration Tribunal to be appointed. This may result in an officer from the NSW Trustee and Guardian (a government body) being involved in the management of your affairs.

Even if you have not lost mental capacity, you may need someone to access your bank accounts or conduct a transaction for you if, for example, you are overseas, in hospital or just find it difficult to get to banks, government agencies, real estate agents and do things yourself.

What level of capacity do I need to make a valid Enduring Power of Attorney?

You must have mental capacity when the document is signed. At that time, you must be capable of understanding the nature and effect of the appointment. You must be capable of understanding the range of decisions which the attorney can make on your behalf and understand that the attorney can make decisions without consulting you.

Who should I appoint as my Enduring Power of Attorney?

You should choose someone whom you trust and who will manage your finances in a responsible way. If your financial affairs are complicated, you should appoint an attorney who has the skills to deal with complex financial arrangements. You may wish to appoint a family member or a close friend as your attorney.

How many attorneys can I appoint?

You can appoint more than one attorney. When appointing more than one attorney, you should choose people who can cooperate with each other and who you trust to work together in your best interests. You can appoint your attorneys to act:

- jointly and severally (this means that the attorneys can make decisions together or separately);
- severally (this means that any one of the attorneys can make decisions independently of the other attorneys); or
- jointly (the attorneys must agree on all decisions).

The appointment may be affected if one of your attorneys dies or cannot continue in their role. This depends on how you appointed the attorneys. If you appoint them to act jointly and one of them is no longer willing or able to carry out their duties you can elect whether you want the appointment to be terminated. However, if you appointed your attorneys to act jointly and severally or severally then the enduring Power of Attorney will continue, even when one of them can no longer act. The remaining attorneys can keep making decisions for you. You can also appoint alternate attorneys if your first choice is unable to act.

What powers can I give an attorney?

Any decisions relating to your finances or property which you could do yourself. The appointment can be completely general in the powers and authority it gives or it can be limited to specify things such as paying certain kinds of bills or selling your house.

If you wish you can give your attorney the authority to give reasonably sized gifts, for example, to close friends or family on special occasions, or make donations to your favourite charities.

You can also authorise your attorney to meet the reasonable living and medical expenses of the attorney himself or herself or nominated other people. Your attorney should therefore be a person in whom you can place your trust.

What are the duties and responsibilities of an attorney?

- Act in the best interests of their Principal
- Keep the Principal's assets separate from their own;
- Not to confer benefits on themselves or on any one else unless they are expressly authorised to do so;
- Keep adequate accounts and records of any dealings with the Principal's assets. These must be made available upon a request from the NSW Trustee or anyone interested in your wellbeing;
- Avoid abusing his or her position as Attorney, including by making a profit or causing a conflict between their duty to the Principal and their own interests; and
- Ensure they always act honestly in all matters concerning your legal and financial affairs.

The prescribed enduring power of attorney form also expressly states that *"failure to do any of the above may incur civil and/or criminal penalties,"* and that the attorney may be liable to compensate you for any losses they have caused.

Should I choose the Enduring Power of Attorney to operate immediately, or only once I have lost the mental capacity to manage my own affairs

We recommend that, in most cases, the appointment of your attorney should be operative immediately and not only in the event that you lose mental capacity. This means that your attorneys can act for you if you are unable to manage your affairs for reasons other than mental incapacity. For example, if you are overseas or physically (but not mentally) incapacitated in hospital. It also means that there is no built in restriction on the powers of your attorney and that your attorney may act as your attorney even if you still have the capacity to manage your own affairs. If you don't trust your attorney to only act in accordance with your wishes, when you are not able to express them, then they are probably not an appropriate person to appoint as your attorney.

If you only allow your attorney to act when you have lost mental capacity, then your attorney will normally be required to prove that you are mentally incapacitated before they will have the power to act on your behalf. This may happen at a time when you require financial assistance quickly. Although including such a restriction provides a measure of protection, it has the potential to cause great inconvenience in the management of your affairs. There is also no guarantee that any person seeking to work with an attorney will accept that the trigger condition (e.g. loss of capacity) has occurred. For example, if a Bank sees a condition or restriction in a Power of Attorney, the Bank may not accept the Power of Attorney or may require an exhaustive examination of medical reports and other documents, by their legal and other staff, before it will accept that the attorney has the power to operate your accounts or otherwise deal with your assets.

Should I disclose my will to my attorney?

It is helpful for an Attorney to know about the contents of your will, particularly if you have left a specific asset to someone in your will. Your attorney will then know about the benefit left to that person and will be able to take that into account when managing your affairs.

Will my attorney be able to manage my assets in places other than NSW?

Some jurisdictions in Australia may recognise Powers of Attorney made in NSW however, this is not always the case. If you have assets elsewhere you should check with a solicitor in that jurisdiction to see if your Power of Attorney made in NSW will be recognised in that jurisdiction.

Should the appointment be registered?

It is not necessary to register a power of attorney unless your attorney needs to deal with your real estate. However, registering a power of attorney is one way of keeping a public record of the document. Bear in mind this will make the document available for anyone to access if they are searching for this record. There is a fee for registering the document.

How do I cancel an Enduring Power of Attorney?

You can revoke (that is, cancel) an Enduring Power of Attorney at any time whilst you have the capacity to do so.

There is no prescribed form for revoking an Enduring Power of Attorney, which means a letter to the attorney can suffice. However, as an attorney is entitled to continue to act as your attorney, until notified of the revocation, it is prudent to serve the notice and to keep evidence of the service. Any third parties your attorney might deal with on your behalf, should also be given notice of the revocation. If you have registered your power of attorney you should also register any document purporting to revoke the power of attorney.

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