

Power of Attorney

WHAT IS POWER OF ATTORNEY?

Power of attorney is when you appoint someone to have the legal authority to look after your financial affairs on your behalf.

There are three types of power of attorney:

General power of attorney – when you appoint someone to make financial and legal decisions for you for a specified amount of time, such as when you are overseas.

Enduring power of attorney – when you appoint someone to make financial decisions for you if you lose the capacity to do so yourself.

Enduring guardianship – when you appoint someone to make day-to-day medical and lifestyle decisions for you in a period of incapacity.

An **enduring power of attorney** and **enduring guardianship** can be made separately or to complement each other to suit your needs.

WHAT IS CAPACITY?

Capacity is the ability to understand what something you do means, and the consequences (including long term consequences) that it may have.

WHY SHOULD YOU USE POWER OF ATTORNEY?

- If you wish to free yourself from the responsibility of paperwork and your financial affairs;
- If you would like to ensure that your finances are secure and working best for your needs;
- If you are travelling overseas or unable to manage your affairs for a period of time;
- If you would prefer that someone outside of your family was managing your finances; or
- If you feel that controlling your own daily affairs has become too overwhelming.

HOW DO I MAKE A POWER OF ATTORNEY?

A formal document outlining who you would like to have power of attorney and what decisions you would like them to make on your behalf needs to be created and signed by the person accepting those responsibilities. It is very important that your input goes into the document and that your specific requirements are met.

It is recommended that advice be sought from a solicitor or a professional trustee, such as the NSW Trustee

and Guardian. For more information on making a Power of Attorney, see the NSW Trustee and Guardian website here: www.tag.nsw.gov.au/wills/make-power-attorney

An Enduring Power of Attorney continues to operate when a person can no longer make decisions or act on their own, and has lost their mental capacity. This loss of capacity means the loss of the ability to understand the nature and effect of an action. A person must appoint their enduring power of attorney before they lose capacity. This gives your appointed enduring power of attorney the authority to manage your financial and legal affairs, when you are no longer able to do so.

The form for an enduring power of attorney must be witnessed by a solicitor.

WHO CAN MAKE A POWER OF ATTORNEY?

Anyone who is over the age of 18 and has the capacity to understand the nature of the appointment can create a power of attorney. It is essential, then, that the appointor understands the types of responsibilities they are giving up, when and how decisions can be made for them, the effect these decisions may have, and how you can cancel or change the power of attorney.

WHAT IS THE DIFFERENCE BETWEEN A WILL AND POWER OF ATTORNEY?

A will ensure that after your death, your assets and belongings are distributed as you wished them to be. A power of attorney empowers someone else to make decisions on your behalf while you are alive.

HOW DO I CANCEL A POWER OF ATTORNEY?

If your circumstances change, and the person appointed as your attorney is no longer suitable, you can cancel power of attorney at any time, called "revocation", provided you have sufficient capacity to do so.

To revoke or cancel a Power of Attorney, you must inform in writing:

- Your attorney that you are bringing their appointment to an end,
- Your bank and any other relevant groups or businesses that attorney may have been dealing with,
- The NSW Land Registry Office (if registered).

A document revoking a power of attorney must state:

- The name of the principal (the name of the attorney is optional);
- The date of the power of attorney if not registered;
- The registered number of the power of attorney if registered;
- The date of revocation; and
- The words "hereby revoke".

You must notify the attorney of such revocation and be able to prove such revocation if required.

You will also need to destroy the original and any copies of the Power of Attorney document.

WHAT POWERS CAN I GIVE MY ATTORNEY?

Any of your existing powers in relation to your finances or property can be transferred to your attorney. The powers can be as general or specific as you wish, and can extend to donating to charities on your behalf, or setting an allowance for the attorney managing your affairs.

WHAT RESPONSIBILITIES WILL MY ATTORNEY HAVE?

Your attorney is required to act with your best interests in mind.

They must adhere to your instructions so long as you are mentally capable and act only in accordance to the powers set out by you.

They must keep their finances separate from yours and not benefit themselves or others with your finances unless specified in the powers of attorney document. They must also keep accurate records of transactions made with respect to your finances.

Disclaimer: *The information in this fact sheet is current to 22 September 2021 and reflects the law as it applies in the State of New South Wales, Australia. It is general information intended only as a guide to the law, and is no substitute for legal advice tailored to your particular circumstances. If you have any further questions, or require assistance, contact the ICLC on 9332 1966.*